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REPORTS OF CASES

DETERMINED BY

THE SUPREME COURT

OF THE

STATE OF NEVADA

DURING OCTOBER TERM, 1916, AND JANUARY,
APRIL, AND JULY TERMS, 1917

REPORTED BY

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CLERK OF SUPREME COURT

AND

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1916

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REPORTS OF CASES
DETERMINED BY
THE SUPREME COURT
OF THE
STATE OF NEVADA

OCTOBER TERM, 1916

[No. 2231]

**THE STATE OF NEVADA, RESPONDENT, v. J. F.
ENKHOUSE, APPELLANT.**

[160 Pac. 23]

1. MAYHEM—INFORMATION—OBJECTION TO SUFFICIENCY—TIME.

An information charging mayhem in the language of Rev. Laws, 6416, defining the offense as unlawfully depriving a human being of a member of his body, or disfiguring or rendering it useless, such as slitting the ear, without charging permanent disfigurement, which, under section 6418, is necessary to conviction, is nevertheless good in the absence of demurrer.

2. MAYHEM—INFORMATION—SUFFICIENCY—"SLIT."

Under Rev. Laws, 6416, defining mayhem to include slitting the ear of a human being, and in view of section 6417, stating that it is immaterial how the injury is inflicted, an information charging that accused bit off a portion of an ear of one C, is sufficient, though "slit" may be broader than "bite."

3. MAYHEM—EVIDENCE—SUFFICIENCY.

Evidence *held* to show permanent disfigurement so as to support conviction of mayhem.

4. CRIMINAL LAW—INSTRUCTIONS—INCLUDED OFFENSES.

Under conclusive evidence of permanent disfigurement, it is not error to refuse instruction permitting conviction of the lesser offense of assault, under Rev. Laws, 6418, which applies only if permanent disfigurement is not shown.

Argument for Appellant

5. CRIMINAL LAW—INSTRUCTIONS—PERMANENT DISFIGUREMENT—PREJUDICE.

An instruction to convict if permanent disfigurement is shown, though incomplete, in failing to define permanent disfigurement, is not prejudicial, where the evidence is without conflict as to extent of the injury which manifestly was a permanent disfigurement, especially in the absence of request for further instruction.

6. MAYHEM—SENTENCE—MINIMUM.

Since Rev. Laws, 6416, providing a maximum punishment for mayhem of fourteen years, does not provide a minimum, the judge may fix the minimum at five years, under section 7260, as amended by Stats. 1915, c. 157, providing that if no minimum is fixed, the court may fix it at one to five years.

APPEAL from Sixth Judicial District Court, Humboldt County; *Edward A. Ducker*, Judge.

J. F. Enkhouse was convicted of mayhem, and he appeals. **Affirmed.**

Salter, Robins & Frame, for Appellant:

The information does not state facts sufficient to constitute the offense for which the defendant was convicted; the court erred in instructing the jury as to matters of law, and in refusing to instruct the jury that an assault and battery, or an assault, was an offense included within the charge in the information; and there was insufficiency of evidence to support the verdict. (Rev. Laws, 6416, 6418.)

The act alleged in the information does not constitute the crime of mayhem, unless it resulted in a permanent disfiguration, a diminution of vigor, or other permanent injury. (*Green v. State*, 125 Am. St. Rep. 17; *State v. Abram*, 10 Ala. 928.)

The instruction of the court as to permanent disfigurement was a misstatement of the law, calculated to mislead the jury, and was prejudicial to the defendant. (*State v. Abram*, *supra*.)

It was error in the lower court to refuse to give the instruction requested by defendant, to the effect that if the jury entertained a reasonable doubt as to whether there was a permanent disfigurement they could convict the defendant of assault, or assault and battery only.

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(*State v. Millain*, 3 Nev. 410; *State v. Dolan*, 50 Pac. 476; 12 Cyc. 639.)

The judgment of the trial court is erroneous, and should be reversed for the reason that the statute prescribes punishment for mayhem, and, while not in terms fixing the minimum, fixes the maximum punishment at fourteen years in the state prison. Under the statute the court had no power to fix the minimum imprisonment at five years. (Rev. Laws, 6283.)

Geo. B. Thatcher, Attorney-General, and *H. C. Price*, Deputy Attorney-General, for Respondent:

The allegations in the information are sufficient to constitute the offense of mayhem. The information charges that the defendant committed the crime of mayhem by biting off with his teeth a portion of the right ear of one Cavaney, thereby disfiguring and disabling said ear. Under the statute, such an act constitutes the crime of mayhem. (Rev. Laws, 6416; *People v. Golden*, 62 Cal. 542.)

The fact that the information does not charge that the act resulted in permanent disfigurement of the ear does not affect the legality of the information. The evidence clearly shows that the disfigurement was permanent. (Rev. Laws, 6418; *Baker v. State*, 4 Ark. 56.)

There is no merit in appellant's contention that the judgment of the trial court is erroneous because it did not comply with the indeterminate sentence law in fixing the punishment. The statute provides that, where no minimum term of imprisonment is prescribed by law, the court shall fix the minimum term in its discretion at not less than one year nor more than five years. (Stats. 1915, p. 192.)

By the Court, NORCROSS, C. J.:

This is an appeal from a judgment of conviction of the crime of mayhem.

It is contended by appellant that the information does not state facts sufficient to constitute the offense for

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which the defendant was convicted; that the court below erred in the giving and refusal of certain instructions and in fixing the minimum of punishment at five years' imprisonment; that the evidence is insufficient to support the verdict.

The charging part of the information reads as follows:

"That the said defendant, J. F. Enkhouse, did then and there wilfully, unlawfully, and feloniously deprive one J. A. Cavaney, a human being, of a member of his body, and did disable and disfigure said member in the manner following: That the said defendant, at the county of Humboldt, State of Nevada, on the date aforesaid, did then and there wilfully, unlawfully, and feloniously bite off with his teeth a portion of the right ear of the said J. A. Cavaney, then and there being, and thereby disabled and disfigured said ear."

1. The crime of mayhem is defined and governed by sections 151 to 153, inclusive, of the Crimes and Punishments Act (Rev. Laws, 6416-6418), which read:

"SEC. 151. Mayhem consists of unlawfully depriving a human being of a member of his or her body, or disfiguring or rendering it useless. If any person shall cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, or disable any limb or member of another, or shall voluntarily, or of purpose, put out an eye or eyes, every such person shall be guilty of mayhem. * * *

"SEC. 152. To constitute mayhem it is immaterial by what means or instrument or in what manner the injury was inflicted.

"SEC. 153. Whenever upon a trial for mayhem it shall appear that the injury inflicted will not result in any permanent disfiguration of appearance, diminution of vigor, or other permanent injury, no conviction for maiming shall be had, but the defendant may be convicted of assault in any degree."

The information was not demurred to. We think the objections to the information ought not to be regarded as well taken, at least in the absence of demurrer. The crime of mayhem is defined in section 151, *supra*, and it

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is sufficient that the offense be charged in the language of the statute or its equivalent. While it is essential, under the provisions of section 153, *supra*, that the proof show that the injury or disfiguration is permanent, in order to warrant a conviction for mayhem, the definition of the crime prescribed in section 151 makes no reference to the permanency of the injury or disfiguration. Possibly this is because there is a presumption that a condition once shown to exist will continue unless the contrary is made to appear. We are clearly of the opinion that if there is any merit in the contention that the information should specifically allege the injury or disfiguration to be permanent in character, that the objection is of a nature which should be taken advantage of by demurrer.

2. It is conceded by counsel for appellant that if the information had charged appellant with unlawfully and maliciously slitting the ear of the said Cavaney, the information would have charged the crime *per se*, but because it is only charged that the appellant bit off a portion of the right ear, such allegation is not the equivalent of charging a slitting of the ear. While the word "slit" may have a broader definition than the word "bite" (*People v. Demasters*, 105 Cal. 669, 39 Pac. 35), the information in question here charges that the appellant did "bite off with his teeth a portion of the right ear * * * and thereby disabled and disfigured said ear." The information, therefore, charges a completed act, which completed act is equivalent to a slitting of the ear, for, by the provisions of section 152, it is immaterial by what means the injury or disfigurement is effected.

3. There is no conflict in the testimony in so far as it showed that the defendant bit off a portion of the right ear of the said Cavaney during a personal encounter between the two following a dispute over a card game. There is no conflict in the evidence relative to the extent of the injury inflicted. The injured ear was submitted to the personal inspection of the jury. Dr. Wilson, a witness for the state, who attended Cavaney immediately after the injury was inflicted, testified that:

"About a fourth of the cartilage of the ear was off; all of what you call the top of the external ear is off and the posterior part of the ear is off down to about the middle of the outer edge."

The evidence is conclusive that, by the act of appellant in biting off the portion of the ear described, a permanent injury or disfiguration of the member was effected. The contention that the evidence is insufficient to support the verdict and judgment is therefore without merit.

4. It is contended that the court erred in refusing defendant's requested instruction which in effect advised the jury that in accordance with the provisions of section 153, *supra*, the jury could find the defendant guilty of assault. We think the court did not commit error in the refusing of this instruction. The evidence, without conflict and without question, showed that the injury inflicted resulted in a permanent disfiguration of appearance. There was no room for any question as to whether a lesser offense might have been committed. In such cases it is not error to refuse an instruction that a verdict for a lesser offense may be returned. (*State v. Johnny*, 29 Nev. 203, 223, 87 Pac. 3.)

5. Appellant assigns error in the giving of instruction No. 8, given by the court of its own motion. The portion of the instruction to which exception is taken reads:

"And then if you should further find from the evidence herein beyond a reasonable doubt that such injury to the said ear of said J. A. Cavaney will result in a permanent disfiguration of the appearance of said ear, then you should convict the defendant of the crime of mayhem."

It is contended that the law is correctly stated in the case of *Green v. State*, 151 Ala. 14, 44 South. 194, 125 Am. St. Rep. 17, 15 Ann. Cas. 81, as follows:

"In this instance the disfigurement, necessary to justify conviction, must have been such as would afford to the casual observer of the person injured, and not such as requires a close or unusual inspection to detect. In other words, the injury to the ear must be such as disfigures to

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ordinary observation, as distinguished from a wounding which simply mars the member.”

We may concede the law to be correctly stated in the Alabama case, *supra*.

The objection to instruction No. 8 goes rather to the question of the extent of the injury necessary to constitute a permanent disfiguration. The instruction states the law correctly. It may be conceded that it could very properly have gone farther and pointed out specifically what was necessary to constitute a permanent disfiguration. There was, however, no request for further instruction upon this phase of the law of mayhem. Even if it be conceded that the instruction is technically erroneous as not fully advising the jury as to the degree of proof necessary to constitute the offense charged, it would not be regarded as prejudicial error, where the evidence is without conflict as to the extent of the injury, which injury manifestly causes a permanent disfiguration.

6. The contention that the court erred in fixing the minimum sentence of appellant at five years' imprisonment is without merit. Where the statute prescribes no minimum sentence, it is within the discretion of the court to fix such minimum at not less than one nor more than five years. (Rev. Laws, 7260, as amended, Stats. 1915, p. 192.)

The judgment is affirmed.

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[No. 2177]

IN THE MATTER OF THE DISBARMENT OF C. O.
BURKERT, AS AN ATTORNEY AT LAW.

[160 Pac. 1198]

ORIGINAL PROCEEDING. Application by the Nevada Bar Association for the disbarment of C. O. Burkert as an attorney at law. **Respondent suspended** from practice until the further order of the court.

Hugh H. Brown and J. H. Evans, for Petitioner.

C. O. Burkert, in propria persona.

By the Court, COLEMAN, J.:

A verified petition, charging C. O. Burkert, a member of the bar of the State of Nevada, with unprofessional conduct while acting in the capacity of attorney, was filed in this court on the initiative of the Nevada Bar Association.

To the petition the respondent filed an unverified answer, denying the allegations of misconduct alleged in the petition.

In a letter to one of the attorneys in this proceeding, the respondent wrote as follows:

"I fully appreciate your position, and do not feel justified in asking for any more favors, and therefore I presume there is nothing for you to do but to go ahead. There will be no contest. The answer filed some time ago was purely formal, and was filed only for the purpose of formally giving me more time. * * *"

It is not claimed that the facts alleged do not constitute sufficient ground for suspension or disbarment. At the hearing, oral and documentary evidence was introduced in support of the allegations of the petition. The respondent is traveling the downgrade of the highway of life. It would serve no useful purpose to discuss the facts of the case, and the "mantle of charity should be over all."

Suffice it to say that the allegations of the petition are fully sustained by the evidence.

Points decided

It is ordered that the respondent, C. O. Burkert, be, and he hereby is, suspended from the practice of the law in the State of Nevada until the further order of the court.

[No. 2223]

EDWIN CLAY AND EMMA CLAY (HIS WIFE), APPELLANTS, v. SCHEELINE BANKING AND TRUST COMPANY (A CORPORATION) AND C. P. FERREL, SHERIFF OF WASHOE COUNTY, STATE OF NEVADA, RESPONDENTS.

[159 Pac. 1081]

1. QUIETING TITLE—COMPLAINT—INTEREST OF DEFENDANT.

Neither under Rev. Laws, 5514, nor independently of it, does a complaint state a cause of action to quiet title, if not alleging that defendants claim an interest in the property adverse to plaintiffs.

2. APPEAL AND ERROR—OBJECTION NOT MADE BELOW—SUFFICIENCY OF COMPLAINT.

The complaint, though praying that title be quieted against defendant, not containing the necessary allegation of a complaint to quiet title, that defendants claim an interest in the property adverse to plaintiffs, but alleging that defendants were endeavoring to cloud and cast a cloud on said property, and the evidence being such as would be offered in an action to prevent a cloud being cast on plaintiffs' title, defendants were entitled to assume that the action was brought merely to prevent a cloud, as regards the contention that, because defendants did not urge in the trial court that the complaint did not state a cause of action to quiet title, they cannot do so on appeal, and that therefore the judgment should be reversed, and one quieting title in plaintiffs be ordered for want of denials in the answer.

3. APPEAL AND ERROR—OBJECTION IN LOWER COURT—ANSWER—EFFECT OF FAILURE TO OBJECT.

Plaintiffs, not having, till after judgment, questioned that the answer stated a defense to the matter pleaded in the complaint, cannot on appeal urge failure of defendants to demur to the complaint, as not stating a cause of action, and to deny certain of its allegations, as ground for reversing the judgment and ordering one for plaintiffs; as a demurrer to an answer which does not aid the complaint will be sustained to the defective complaint.

APPEAL from Second Judicial District Court, Washoe County; *R. C. Stoddard*, Judge.

Action by Edwin Clay and wife against the Scheeline Banking and Trust Company and another. From an adverse judgment, plaintiffs appeal. **Affirmed.**

Argument for Appellant

Summerfield & Richards, for Appellant:

It is alleged in the complaint, and not denied in the answer, and it is admitted in the evidence by both the appellants and respondents, that the latter have no right, title, interest, claim, or demand in or to the real property described in the complaint, and that the appellants are the owners thereof, seized in fee simple absolute, in the possession and entitled to the immediate possession of said real property, and there is no issue in regard thereto, and that respondents are clouding said real property, as alleged in the complaint; and it nowhere appears in the evidence that respondents showed or offered to show a superior or any right, title, interest, claim, or demand in or to said real property, or any part thereof. Accordingly, this appeal is taken from the judgment and order denying the motion for a new trial, in which is included the indeterminate order denying the motion for judgment on the pleadings.

We submit that the judgment and orders appealed from should be reversed, with directions to the trial court to enter judgment pursuant to the complaint, without further trial. The law on the subject is well settled. (*Scorpion M. Co. v. Marsano*, 10 Nev. 370, which overrules *Blasdel v. Williams*, 9 Nev. 161; *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 312; *Rose v. Richmond Co.*, 17 Nev. 52; *Union Co. v. Warren*, 82 Fed. 519; *Shattuck v. Carson*, 2 Cal. 588; *Alverson v. Jones*, 10 Cal. 11; *Curtis v. Sutter*, 15 Cal. 259; *Amter v. Conlan*, 22 Colo. 150; *Ely v. Railroad Co.*, 129 U. S. 260; *Rucker v. Kensington*, 47 N. H. 270.)

The complaint states a cause of action; not only in equity, independent of the statute, but also under the statute. The allegation pleaded shows affirmatively an adverse claim or assertion, apparently valid, which would require extrinsic evidence to remove; also, a cloud upon the land which equity will remove independent of statute. Every cloud necessarily must be adverse to the legal title. (Cloud on Title, 7 Cyc. 255-257; *Low v. Staples*, 2 Nev. 211; *Scorpion M. Co. v. Marsano*, *supra*; *Golden*

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Fleece Co. v. Cable Con. Co., *supra*; *Rose v. Richmond Co.*, *supra*.)

The point that the complaint does not state facts sufficient is raised for the first time in this court by respondents, after judgment on the merits in their favor, and after waving demurrer on that ground. In such case, if respondents are to be permitted to raise this objection for the first time in this court, the court will indulge every intendment in favor of the complaint. (*Omaha National Bank v. Kiper*, 60 Neb. 37; *Phenix v. Gardner*, 13 Minn. 433; *Smith v. Dennett*, 15 Minn. 86.)

Respondents should not be permitted to question the sufficiency of the complaint after a decision on the merits in their favor, and after withholding their objections to the complaint from the trial court, where the same might have been overcome, and there agreeing that the demurrer be submitted, after it had slumbered for months on the files, without argument. (3 C. P. 788; *Crane Co. v. Aetna Co.* 86 Pac. 849; *Henley v. Kings County*, 79 Pac. 624; *Watson v. Kent*, 76 Pac. 297; *Mosher v. Bruhn*, 46 Pac. 397.)

The admission by the pleadings, on account of there being no denial in the answer, that "notwithstanding the further fact that defendants have no right, title, interest, claim, or demand in or to the said real property, or any part thereof, and these plaintiffs are the owners thereof, seized in fee simple absolute, in the possession and entitled to the immediate possession of said real property," which said admission is reaffirmed in the evidence, is not an averment of a conclusion of law. (32 Cyc. 1377; *Daly v. Sorocco*, 80 Cal. 367; *Naddy v. Ditze*, 15 S. D. 26; *Chaffee-Miller Land Co. v. Barber*, 12 N. D. 478.)

James T. Boyd, for Respondents:

The complaint in the action sets out the fact that the plaintiffs are the owners of certain real property, upon which they filed a declaration of homestead; that the defendants levied upon the property and threatened to sell it under a writ of execution. The answer admitted

Argument for Respondents

that the plaintiffs were the owners of the premises, but denied that they were residents at the time of the alleged claim of homestead, or were entitled to claim the said premises or its appurtenances as a homestead. The only issue in the case, as tried by the court, was as to whether the alleged declaration of homestead was valid. The lower court found against the appellants on all questions.

This is not an action, nor can it be termed an action, brought under section 5514, Revised Laws, for the reason that there is no averment or allegation that the defendants are claiming title adversely to the plaintiffs. It appears by the complaint that the defendants levied upon the property to satisfy an execution; and to maintain an action under section 5514, Revised Laws, it must be alleged and must appear that the defendants are claiming title to the land adversely to plaintiffs. Unless it does so appear, the complaint fails to state a cause of action. (*Union M. & M. Co. v. Warren*, 83 Fed. 519.)

In this case, defendants were seeking to sell the property under the execution; they must have affirmatively recognized that the plaintiffs were the owners of the property. Hence, the only question in this case now to be determined is the action of the court in holding that the property was not exempt from execution, and that the attempted declaration of homestead was void on account of the failure of the plaintiffs to make it their home.

Before a valid homestead can exist under section 2142 of the Revised Laws, it must appear that the person or persons claiming the same were actually residing upon the premises; that they intended to claim the same as a homestead, and that the declaration was filed for the purpose of preserving the home that they were residing in. Such homestead must be an actual residence, and must be in good faith. (Rev. Laws, 2142; *Boreham v. Byrne*, 83 Cal. 23; *Gregg v. Bostwick*, 33 Cal. 220; *Gambette v. Brock*, 41 Cal. 83; *Laughlin v. Wright*, 63 Cal. 113; *Tromans v. Mahlman*, 92 Cal. 1; *Babcock v. Gibbs*, 52 Cal. 629; *Aucker v. McCay*, 56 Cal. 524; *Dorn v. Howe*, 52 Cal. 631.)

An owner of a lot of land having two houses thereon, which are separated from each other by a fence, who exclusively resides in one of the houses, the other being occupied by a tenant, can acquire a homestead only on that part of the lot on which the house in which he resides is situated. (*Lubbock v. McMann*, 82 Cal. 226; *Tiernon v. Creditors*, 62 Cal. 286; *Laughlin v. Wright*, 62 Cal. 113; *Maloney v. Hefer*, 75 Cal. 422; *In re Allen*, 78 Cal. 293.)

By the Court, COLEMAN, J.:

This is an appeal from a judgment in favor of respondents, who were defendants in the district court, by Edwin Clay and Emma V. Clay, his wife, who were plaintiffs in the district court.

In their complaint it is alleged that the plaintiff Emma V. Clay was the owner of certain improved real estate; that the plaintiffs had been, and at the time of filing the suit were, residing upon the property; that the plaintiffs filed and had recorded in the proper office their homestead selection, designating the property in question as a homestead. It is also alleged in the complaint as follows:

"That, notwithstanding the fact hereinabove alleged that the ownership of said real property by said Emma Clay as aforesaid, and the declaration thereon by herself and said Edwin Clay of the homestead marked Exhibit A, hereby specially referred to and made a part hereof, the said defendants, Scheeline Banking and Trust Company, a corporation, and C. P. Ferrel, sheriff of Washoe County, State of Nevada, are endeavoring to cloud and cast a cloud upon said real property, in that they and each of them are causing to be sold said real property pursuant to a certain judgment dated the 16th day of March, 1915, wherein said defendant Scheeline Banking and Trust Company recovered a judgment against said plaintiffs, in that certain action entitled Scheeline Banking and Trust Company, a corporation, plaintiffs, against Edwin Clay and Emma Clay, for the sum of \$2,004.83, and the interest thereon, pursuant to the terms of said

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judgment, and notwithstanding the further fact that said defendants have no right, title, interest, claim, or demand in or to said real property or any part thereof, and the said plaintiffs are the owners thereof, seized in fee simple absolute, in the possession, and entitled to the immediate possession of said real property."

The prayer of the complaint is as follows:

"Wherefore plaintiffs pray that the title and ownership to said real property be forever quieted against said defendants and each of them, and that said plaintiffs be declared to be the owners of said real property and the whole thereof, and that said plaintiffs have judgment herein pursuant to law accordingly, and for costs of suit."

Omitting the introductory statements, the answer of the defendants reads:

"Denies that the plaintiffs were residing at the time of the alleged claim of homestead or at any other time on the described premises; denies that the plaintiff claimed the property and its appurtenances set forth in plaintiffs' complaint as a homestead, or that the plaintiffs, or either of them were entitled to claim said premises and appurtenances as a homestead, by reason of the declaration of homestead or otherwise, or at all; denies that at the time of the alleged declaration of homestead, or at any other time, the plaintiffs or either of them were actually or at all residing or living upon said described premises, or that they claimed, or intended to claim, or that they were entitled to claim, said premises and its appurtenances or any part thereof as a homestead, or that said premises was or could be claimed as a homestead; denies that said premises was ever used by the plaintiff as a homestead."

The case was tried before the court without a jury, and the court in its findings of fact found that:

"At the time the declaration of homestead was made and filed the plaintiffs were not residing thereon, and had not the intention to use, and did not actually use and occupy, the premises described in said declaration as a homestead as required by section 2142 of the Revised Laws of Nevada 1912."

Judgment was entered dismissing the action, and for costs in favor of respondents.

The application to this court to reverse the judgment of the trial court and to order that court to enter judgment on the pleadings in favor of appellants is based upon the idea as set forth in the following language quoted from the brief of counsel for appellants:

"It is admitted in the pleadings, since it is not denied in the answer, that respondents have no right, title, interest, claim, or demand in or to the real property described in the complaint, and that appellants are the owners thereof, seized in fee simple absolute, in the possession and entitled to the immediate possession of said real property, and the respondents are clouding said real property as alleged in the complaint."

In other words, as we understand the contention of counsel for appellants, we are asked to make the order mentioned, for the reason that the answer of defendants failed to deny that they had no right, title, interest, claim, or demand in the property in question.

In view of the fact, as appears from the complaint of appellants, that respondents are seeking to satisfy a judgment in favor of one of the respondents and against the appellants, it would indeed be a rather remarkable situation if respondents were aiming to sell property which belonged to respondents, or either of them, instead of property of appellants. We cannot imagine whose property respondents would sell if not the property of appellants. Surely they would not sell the property rights of respondents. However, if respondents, or either of them, had or claimed an interest in the property (not adverse to appellants), we know of no reason why they might not sell such interest in the property as appellants might have, whether it be an undivided one-half or an equity. As we read the complaint, respondents are seeking to sell whatever interest appellants have in the property, and we know of no way to stop them, so long as the judgment stands upon which the execution was issued.

1. Plaintiff's complaint cannot be construed as one to quiet title, either under our statute or independent of statute. Section 5514, Revised Laws of Nevada, relative to actions to quiet title, reads:

"An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim."

Mr. Pomeroy, in his work on Code Remedies (3d ed.), at section 363, says:

"The nature of the action to quiet title is such that it is impossible to lay down any but the most general rule in relation to its parties defendant. The very object of the proceeding assumes that there are other claimants adverse to the plaintiff, setting up titles and interests in the land or other subject-matter hostile to his. Of course, all these adverse claimants are proper parties defendant, and if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants. Originally, and independent of statute, this particular jurisdiction of equity was only invoked when either many persons asserted titles adverse to that of the plaintiff, or when one person repeatedly asserted his single title by a succession of legal actions, all of which had failed, and in either case the object of the suit was to settle the whole controversy in one proceeding. The action has, however, been greatly extended by statute, especially in the Western States, and is there an ordinary means of trying a disputed title between two opposite claimants."

The court, in *Low v. Staples*, 2 Nev. on page 213, in speaking of the effect of the statutory action to quiet title, as the statute existed at that time, said:

" * * * The old equity jurisprudence of the court is extended, but further than this we do not think it affected."

Thus it will be seen that there is practically no difference in the nature of the action under our statute and as it exists independent of statute, and hence we should

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have very little trouble in determining if the complaint is good. Whether we look to our statute or the nature of the action as it exists independent of statute to ascertain the essentials of a complaint in an action to quiet title, we find that one of the essentials of a good complaint in such an action is that it must show that the defendants claim an interest in the property adverse to the plaintiffs.

2. There is no such allegation in the complaint in this case, or anything approaching it; hence the complaint does not state a cause of action to quiet title. But it is said that, as respondents did not urge this point in the lower court, it cannot be urged here. In view of the record in this case, as made in the lower court, we do not deem it necessary to decide this question, though we might call attention to the fact that section 5045 of the Revised Laws provides what shall and what shall not be waived by failure to demur.

As we read the record in this case, the complaint was drawn and the case tried upon the theory that to permit a sale under the judgment pleaded in the complaint would cast a cloud upon plaintiffs' title, and that, in view of the claim that the property was exempt as a homestead, a court of equity should not permit such a cloud to be cast thereupon, and to prevent it the action was commenced. We are of this opinion for the reason that the complaint does not contain the necessary allegation to constitute it an action to quiet title, but, on the other hand, as appears from that portion of the complaint heretofore stated, it alleges that respondents were "endeavoring to cloud and cast a cloud upon said real property," and the evidence offered was not such evidence as would be offered in an ordinary action to quiet title, but such as would be offered in an action to prevent a cloud being cast upon the title of plaintiffs.

We think that, in view of the nature of the complaint, counsel for respondents had a right to assume that the action was brought, not to quiet title, but to prevent a cloud being cast upon the title of plaintiffs, and therefore

McCarran, J., concurring

was justified in not urging in the trial court that the complaint did not state a cause of action.

8. But, to go a step further, it seems to us that appellants are in a rather peculiar position, in that they did not demur to the sufficiency of the answer of respondents in the court below, or in any way question that it stated a defense to the matter pleaded in the complaint, until after judgment, but now assert that, notwithstanding this fact, they can take advantage of respondents' failure to demur to the complaint on the ground that it does not state a cause of action.

It is the general rule applicable to pleading that a demurrer runs through the whole series of pleadings, and will be sustained to the first defective pleading. (31 Cyc. 338.) Of course, if the answer so aids the complaint as to make out a cause of action against a defendant, the rule would not apply; but such is not the fact in this instance. So it seems that in any event appellants' contention that this court should reverse the judgment and order that judgment be entered in favor of appellants cannot be sustained.

The only reason offered by plaintiffs, either in their complaint or in their evidence, why the property should not be sold, is the claim asserted by them that it is exempt as a homestead. The trial court held that this claim was not well founded, and this finding is not assailed in this court.

It is ordered that the judgment be affirmed.

NORCROSS, C. J.: I concur.

MCCARRAN, J. (concurring in the order):

I concur in the order. It would appear from the record in this case that the action had been commenced with a view to establishing a homestead exemption in favor of appellants herein, which exemption, if established, would relieve the property from sale under execution. The matter of the right of appellants to claim a homestead exemption, whether correctly or erroneously decided by the court below, is not involved in the appeal. Counsel

McCarran, J., concurring

for appellants, in his oral argument, in response to a question propounded by the court, so asserted. The question involved was one, as we view it, intended to prohibit the respondents from selling the property in question under execution issuing pursuant to a judgment obtained.

Assuming, for argument's sake, that the question was one to quiet title, if the homestead phase of the controversy were abandoned, as we take it to have been, the court might well have granted all of the prayer of appellants' complaint, in fact might have rendered judgment on the pleadings, and hence declared that respondents had no right, title, or interest in or to the real property described in the complaint, and that appellants were the owners thereof, seized in fee simple absolute, and that they were entitled to immediate possession of the premises; and, even if judgment had been rendered in such a form, it would avail nothing in behalf of appellants in the way of preventing the levy of an execution, or the sale of the premises under the execution issued pursuant to the judgment, previously rendered in another case, wherein the appellants here were defendants, and the respondent the Scheeline Banking and Trust Company became a judgment creditor.

If the appeal in this case involved an order of the trial court in its finding and conclusion as to the homestead exemption, I am not ready to say that the findings of the trial court in that respect or a judgment based on such findings could have been affirmed. Definitely as to this, however, I express no opinion. We are referred to no law, and we know of none, in the light of which a suit to quiet title will serve the purpose of an action to prohibit a sale under execution issued pursuant to judgment.

We take it from the position of counsel for appellants, expressed in his oral argument, that they concede that the property in question is not subject to a claim of homestead exemption in behalf of appellants. This being conceded, the property must therefore be such as is subject to sale under the execution, if it be property the title to which is rightfully in the name of the judgment debtor

Points decided

against whom execution has issued. A decree, even though it had been rendered on the pleadings in this case, could at most but have confirmed title in appellants, the judgment debtors. Would such a decree or judgment deprive the judgment creditor of the right to sell the property under execution, where the former judgment had been duly rendered against the party to whom, in these proceedings, title in fee had been decreed? We are at a loss to find a rule that will support an answer in the affirmative.

[No. 2212]

SU LEE AND CHARLEY BI YEN, SUING FOR THEMSELVES AND OTHERS AS MEMBERS AND ON BEHALF OF THE LIN HING GUNGSHA, OR JOSS HOUSE SOCIETY, OF RENO, NEVADA, APPELLANTS, v. F. J. PECK, JOHN QUINN, JAMES MAY, A. H. MANNING, C. H. MARTIN, AND IDA ROBBINS, RESPONDENTS.

[160 Pac. 18]

1. GIFTS—LAND—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to quiet title to land occupied by a joss house held to show a gift of such land to a joss house society.

2. TRIAL—QUESTION OF FACT—NONSUIT.

On a motion for a nonsuit, the evidence should be construed in favor of the plaintiff.

3. RELIGIOUS SOCIETIES—PROPERTY—CAPACITY TO TAKE GIFT.

An unincorporated joss house society can take title to real estate in this state under the common-law rule that land may be given to pious uses before there is a grantee competent to take, and that, in the meantime, the fee lies in abeyance and vests when the grantee exists.

4. RELIGIOUS SOCIETIES—GIFT—CAPACITY TO TAKE—ESTOPPEL.

Where a lot was given to a joss house society in consideration that the Chinese inhabitants would locate in the vicinity of the lot, and of the society's improvements on the lot, the donor and his grantee are estopped from asserting the society's incapacity to take title to the lot.

APPEAL from Second Judicial District Court, Washoe County; *R. C. Stoddard*, Judge.

Suit by Su Lee and Charley Bi Yen, suing for themselves and others as members and on behalf of the Lin Hing Gungsha, or Joss House Society of Reno, Nevada,

Argument for Respondents

against F. J. Peck and others. From a judgment of nonsuit and from an order denying a motion for a new trial, plaintiffs appeal. **Reversed**, and cause remanded for new trial, NORCROSS, C. J., dissenting.

Cole L. Harwood, for Appellants:

The court erred in entering the judgment of nonsuit and refusing to grant a new trial, because the testimony showed a gift to the plaintiffs for a public charitable use. Under the facts in the case, the doctrine of charitable uses is clearly applicable. (Storey's Equity, 13th ed., vol. 2, p. 503, 513, 514; 6 Cyc. 903.) It has been decided in many cases that the doctrine rests purely upon grounds of public policy and well-known principles of equity. (*Ould v. Washington Hospital*, 95 U. S. 303; *Russell v. Allen*, 107 U. S. 163.) It is even held that where the gift is to a person incapable of taking, the grantor himself holds in trust. (*Werlein v. Kurtz*, 2 Peters U. S. 566; *Reformed Church v. Schoolcraft*, 65 N. Y. 134.)

There can be no dispute upon the legal proposition that a gift of real estate may be made which is valid in law, provided possession is delivered and followed by valuable improvements made in good faith, and that the possession is held for the statutory period.

M. B. Moore and Hoyt, Gibbons & French, for Respondents:

The motion for nonsuit was properly granted, an unincorporated religious society being incapable of acquiring title to real estate; and, further, the plaintiffs had not shown a gift of the premises in question, but had shown only a license to occupy the premises, without the payment of rent, at the will of the real owners, and such license could not ripen into title. (*McDonald v. Fox*, 20 Nev. 368; *Lathrop v. Levarn*, 74 Atl. 331; Standard Cyc. of Proc. vol. 1, p. 618.)

The house erected on the premises was not dedicated solely to religious worship, and the celebrations held therein did not amount to religious worship, such as is

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contemplated or recognized in any civilized country. (*People v. Ruggles*, 5 Am. Dec. 335.)

Respondents disclaimed any personal interest in the premises, and having failed to prove the existence of any so-called joss house society, the alleged organization cannot itself maintain the action. (*Mexican Mill v. Yellow Jacket Co.*, 4 Nev. 40, 97 Am. Dec. 510.) "Mere voluntary religious associations are incapable of taking or holding real property in their society name." This rule is well-established and settled in numerous jurisdictions. (*Stewart v. White*, 55 L. R. A. 211; *Hardesty's Succession*, 22 La. Ann. 332; *In re New South Meeting House*, 13 Allen, 497; *Betts v. Betts*, 4 Abb. En. Cas. 317; *Liggett v. Ladd*, 21 Pac. 133; *Goesele v. Bimeler*, 10 Fed. Cas. No. 5503, 5 McLean, 223; *Gallupville Reformed Church v. Schoolcraft*, 65 N. Y. 134.)

Failure to pay taxes on real estate for a period of five years will defeat title by adverse possession. (*Reno Brewing Co. v. Packard*, 103 Pac. 415, 104 Pac. 801.) Even though the law provides that the property of a church is exempt from taxation, the church or religious society, in order to acquire title to property by adverse possession, must comply with the statute regarding the payment of taxes. (*Wisner v. Chamberlain*, 7 N. E. 68; *Streeter Co. v. Frederickson*, 91 N. W. 692; *Timmons v. Kidwell*, 27 N. E. 756.)

By the Court, COLEMAN, J.:

This is an appeal from a judgment of nonsuit and from an order denying a motion for a new trial.

1. Su Lee and Charley Bi Yen, suing for themselves and others as members of and on behalf of the Lin Hing Gungsha, or Joss House Society of Reno, Nevada, an unincorporated society, brought suit against the defendants to quiet title to certain real estate. The pleadings are in the usual form. At the conclusion of the evidence offered on the part of the plaintiffs, a motion for a nonsuit was interposed. The court sustained the motion, upon the ground that an unincorporated society cannot take title

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to real estate in Nevada. In denying the motion for a new trial the court adhered to its original view, and also held that plaintiffs had failed to prove a gift of the property in question to the society, but that the evidence showed only a license to occupy the premises in question without rent, and that possession under such conditions was not such an adverse possession in the society as could ripen into title.

We will consider the last proposition first.

Ong Chee, a witness in behalf of plaintiffs, testified:

"Q. Well, did you have anything to do with the location of that joss house over there? A. Yes; that time when I was put up money, me help to build that building. * * *

"Q. Well, now, state what you had to do, if anything, with the location of the joss house in Chinatown? A. * * * Well, when—first after the fire burn up the town and Mr. Manning asked these Chinamen to move down that place, first place Chinamen think that place is too low; didn't want to move down in the first place. After that they come talk to me and try to get these Chinamen to move down there and he willing to give them a place, a lot of land to build a church, joss house, and then I told him I will move up to Carson—I ain't got anything to do with this town—and you better go down there and talk to Su Lee and Quong Ah Moon, that is the store name, man's name keeps the store here.

"Q. Well, did you have a further talk with Mr. Manning and Mr. Haskell about it? A. Then I take Mr. Manning—you see, that time Chinatown burn, and that fellow Quong Ah Moon and Su Lee had a laundry house on this side of the depot, and I take him up there and show him the place where Su Lee is and Quong Ah Moon is, and he have a talk with them. So I didn't talk to him afterwards. * * *

"Q. State exactly, as near as you can remember, what either Mr. Manning or Mr. Haskell said about giving this land, if anything? A. Well, he says he give—he willing to give that piece of land to build joss house, a lot of land.

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"Q. Who did he say that to? A. He say that to me first place. And then I tell him I move my store up to Carson City, and I ain't got nothing to do with it, and then I take them up to talk to Su Lee and Quong Ah Moon.

"Q. Did you have—did you hear what they said to him? A. Yes; I hear him. I haven't time to wait for them, and after that they stay there and talk a long while, I suppose; I didn't wait for them. I tell him to go up there and explain it to Su Lee and Quong Ah Moon.

"Q. When was this? What year was this conversation that you refer to? A. That was on the '78.

"Q. About '78? A. In 1878.

"Q. Do you know how soon after that the joss house was built that you describe, the two-story building, the first one? A. That joss house built in '79. I suppose on about between April and May, I think.

"Q. In '79? A. In '79 I think; about in the summer time.

"Q. Were you ever in that building after it was built? A. Oh, yes. I was here when he build him; they had lots of fun there, lots of people from Winnemucca and Truckee and all those places come here.

"Q. Had a kind of ceremony? A. Yes; had some kind of ceremony.

"Q. And were you ever in— That building you have said was burned. Were you ever in the building that is there now? A. Oh, yes.

"Q. When did you move to San Francisco? When did you leave Nevada? A. I leave Nevada about 26 years ago.

"Q. About 26 years ago? A. Yes.

"Q. And how many times were you in that building; say that is there now? A. Well, the time that he build it I think many times; many times when he build it before I went to San Francisco, and then when I come back from San Francisco mostly 2 or 3 years time I come up here and sometimes drop in. Many times I been in there.

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"Q. And do you know what the building that was put on there first, the two-story building, what it was used for? A. Joss house.

"Q. Well, what do you mean by that? What is a joss house used for? A. Joss house, you know, what the Chinese please God, see.

"Q. Use like a church? A. Just the same like a church, yes.

"Q. Well, just describe how it was used? A. Well, joss house the same as people—you people please the same, all the same people same as church, all the same; nearly the same.

"Q. Well, what do the Chinamen do that go there? A. Well, sometimes Chinamen go there, you know, please God, some Chinamen, you know always please God. Anything he want to do anything he go ask God. And then any Chinaman sometimes have a dispute from the other, then all go there and try to have compromise make out, make him come and man decide the business there sometime. Any of the Chinamen or one of them have a dispute one to the other, you know, and they try to make compromise, settle it, anything of that kind, business men all go there to meet him, get him settle it, you know. Any poor man dead, anything of that kind, always that society they help him out. Anybody got no money to bury it, anything of that kind, they pay out money to bury them. Any sick man, anything of that kind, they try to help him.

"Q. Well, do they take sick men there sometimes? A. Yes; sick man in behind little place hospital before; right behind joss house.

"Q. Right behind the joss house? A. Yes.

"Q. Are you acquainted with the customs of Chinese people? A. This Chinatown here?

"Q. Do you know the customs and manners of Chinese people? A. China people here in town?

"Q. Yes. A. Oh, yes.

"Q. And are you acquainted with the customs of Chinese people in San Francisco and in China? A. Yes.

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"Q. Then I will ask you whether this building called the joss house here was used as a joss house according to the customs of Chinese people? A. Yes."

Su Lee, one of the plaintiffs, testified in part as follows:

"Q. Ask him if he knew a man named Manning and a man named Haskell. A. Yes, sir.

"Q. Ask him if he ever had any conversation with Mr. Manning or Mr. Haskell about the joss house and Chinatown. A. Yes, sir.

"Q. Let him state what they said to him. A. He says since the Chinatown burn people in Reno went—the Chinese move out and find a new location, and some fellow, white fellow, ask the Chinese want to move another way, so the Chinese don't like it. So Mr. Manning said, 'Why don't you move down here?' The same now as the Chinatown here.

"Q. All right. Go ahead. A. Then Mr. Manning and Haskell call all the Chinamen and interview the new Chinatown, view the place, and all Chinese like that place, so Mr. Manning build two houses, one or two wooden buildings, to rent to all Chinese. And now one brick building, as some now occupy, and he contract with Mr. Manning to build that store.

"Q. All right. Go ahead. A. Since Mr. Manning build that two house, and some Chinamen they went to build some more cabin on the Chinatown by themselves, by Chinamen, and a year later the Chinese want to build a church, the so-called joss house. And he is with Mr. Manning to build that joss house.

"Q. Well, ask him if Mr. Manning said anything, or Mr. Haskell, about giving him or the China boys a lot for a joss house. A. Yes, sir.

"Q. What did they say? A. So he asked Mr. Manning, Mr. Haskell, if he could give the lot to the Chinamen to build a joss house. Then Mr. Manning take him down to Chinatown; told him he could have the lot. He give the lot to him, and say he could build joss house any size he want, and he charge no rent and pay no tax, and give

it to him to protect all Chinese sick people; was forever Chinese.

"Q. Ask him if Mr. Manning or Mr. Haskell went with him and he marked out the lot, put stakes down, or anything like that. A. Mr. Manning take him down and measure and show him the lot, stuck up square all of the corner and show him that is the place going to build for joss house. That is what Mr. Manning said.

"Q. And ask him if they set up stakes, stick stakes, on the corners. A. Yes, sir.

"Q. Ask him if that was the same place they build the joss house. A. Same place. * * *"

"Q. Ask him if Mr. Manning or Mr. Haskell, or any other person, ever said they owned the property, or said anything about the property, about the title to the property after that time. A. He said he asked Mr. Manning. Manning said give to him; this belong to the joss house property."

Charley Bi Yen, a witness called in behalf of plaintiff, seemed to have given a portion of his testimony direct and some through an interpreter. In answering directly, when asked what was said by Mr. Manning, the witness replied:

"Yes, I give China boy for the joss house. I tell him Mr. Peck no use lawsuit, row. No use row about that. I tell him Mr. Peck * * * Manning tell him Mr. Peck, he say."

The following seems to have been the testimony which the witness gave through an interpreter:

"Mr. Manning did tell Mr. Peck I give that joss house to the Chinamen. Don't bother with it. Leave it alone."

The testimony upon which it is claimed that a license was granted to use the lot in question for a joss house is that of the witness John Fraser, wherein he testified relative to a conversation with Mr. Manning, and said:

"And we got to talking about old times in Reno, and this China question was brought up, and I says, 'There ain't much left down in Chinatown now except the joss

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house on the south side.' And he says, 'No.' He says he guessed they will keep that as long as they don't have to pay anything on the rent of the ground. He didn't tell me that he gave them the ground or anything of that kind. But he said they had never paid any rent on it."

2. We cannot see that there is anything in the testimony of the witness Fraser which is in conflict with the evidence of the other witnesses. He simply related that Manning had said that the society did not have to pay rent; but Manning did not say he had or had not given the ground to the society. If he had given the ground to the society "forever," as testified by Su Lee, they certainly would not have to pay rent. The language used by Manning was in no way contradictory of the testimony given by the witnesses who appeared in behalf of the plaintiffs. It is an elementary rule that on a motion for a nonsuit the evidence should be construed strongly in favor of the plaintiff. (*McCafferty v. Flinn*, 32 Nev. 269, 107 Pac. 225.)

3. This brings us to a consideration of the question whether an unincorporated religious society can take title to real estate in Nevada. We think it can. Counsel for respondents, in support of their contention, rely upon the following language from 34 Cyc. p. 1149, to sustain their position:

"Mere voluntary religious associations are incapable of taking or holding real property in their society name."

Some of the cases cited in support of the text rely upon *Trustees of Baptist Association v. Hart*, 4 Wheat. 1, 4 L. Ed. 499, to sustain the position taken, while the case of *Goesele v. Bimeler*, Fed. Cas. No. 5503, 5 McLean, 223, affirmed, Id., in 14 How. 589, 14 L. Ed. 554, was not a case of a gift for charitable uses. Some of the other cases cited do not give the question the consideration which it merits. The case which most strongly sustains the position of respondents is that of *Baptist Association v. Hart*, *supra*, but that case was overruled by a unanimous court in *Vidal v. Girard's Executors*, 2 How. 127, 11 L. Ed. 205, the opinion having been written by Story, J., who was a

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member of the court when *Baptist Association v. Hart* was decided. After some consideration of the common law and the statute of 43 Elizabeth, known as the "Statute of Charitable Uses," the opinion proceeds:

"There are, however, dicta of eminent judges (some of which were commented upon in the case of 4 Wheat. 1, 4 L. Ed. 499) which do certainly support the doctrine that charitable uses might be enforced in chancery upon the general jurisdiction of the court, independently of the statute of 43 Elizabeth, and that the jurisdiction had been acted upon, not only subsequent, but antecedent, to that statute. Such was the opinion of Sir Joseph Jekyll in *Eyre v. Countess of Shaftsbury*, 2 P. Will. 103, 2 Equity Abridg. 710, pl. 2, and that of Lord Northington in *Attorney-General v. Tancred*, 1 Eden, 10 (S. C. Ambler, 351, 1 Wm. Black. 90), and that of Lord Chief Justice Wilmot, in his elaborate judgment in *Attorney-General v. Lady Downing*, Wilmot's Notes, p. 1, 26, given after an examination of all the leading authorities. Lord Eldon, in the *Attorney-General v. Skinner's Company*, 2 Russ. 407, intimates in clear terms his doubts whether the jurisdiction of chancery over charities arose solely under the statute of Elizabeth, suggesting that the statute has perhaps been construed with reference to a supposed antecedent jurisdiction of the court, by which void devises to charitable purposes were sustained. Sir John Leach, in the case of a charitable use before the statute of Elizabeth (*Attorney-General v. Master of Brentwood School*, 1 Mylne and Keen, 376) said: 'Although at his time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute.' In point of fact the charity was so decreed in that very case, in the twelfth year of Elizabeth. But what is still more important is the declaration of Lord Redesdale, a great judge in equity, in *Attorney-General v. Mayor of Dublin*, 1 Bligh New R. 312, 347 (1827), where he says: 'We are referred to the statute of Elizabeth, with respect to charitable uses, as creating a

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new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law. It created a new and ancillary jurisdiction, a jurisdiction created by commission, etc.; but the proceedings of that commission were made subject to appeal to the lord chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the court of chancery as it existed before the passing of that statute; and there can be no doubt that by information by the attorney-general the same thing might be done.' He then adds: 'The right which the attorney-general has to file an information is a right of prerogative. The king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases.' So that Lord Redesdale maintains the jurisdiction in the broadest terms, as founded in the inherent jurisdiction of chancery independently of the statute of 43 Elizabeth. In addition to these dicta and doctrines, there is the very recent case of the *Incorporated Society v. Richards*, 1 Drury and Warren, 258, where Lord Chancellor Sugden, in a very masterly judgment, upon a full survey of all the authorities, and where the point was directly before him, held the same doctrine as Lord Redesdale, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth.

"Mr. Justice Baldwin, in the case of the will of Sarah Zane, which was cited at the bar and pronounced at April term of the circuit court in 1833 (see Brightly's N. P. Repts. Magill & Brown, 346, note), after very extensive and learned researches into the ancient English

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authorities and statutes, arrived at the same conclusion in which the district judge, the late lamented Judge Hopkinson, concurred; and that opinion has a more pointed bearing upon the present case, since it included a full review of the Pennsylvania laws and doctrines on the subject of charities.

"But very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the court of chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish, in the most satisfactory and conclusive manner, that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in, the court of chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do, in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject when the case of the *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. 1, 4 L. Ed. 499, was before this court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

From the quotation it will be seen that the case of *Baptist Association v. Hart* is completely overthrown, and the rule that a gift to an unincorporated religious society of property to be dedicated to pious uses was held

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to be good at common law. We know of no decision wherein the opinion in *Vidal v. Girard* has been criticized. In *Ould v. Washington Hospital*, 95 U. S. (5 Otto) on page 313, 24 L. Ed. 450, it is said:

"At common law, lands may be granted to pious uses before there is a grantee competent to take. In the meantime, the fee will lie in abeyance. It will vest when the grantee exists. (*Town of Pawlet v. Clark*, 9 Cranch, 292, 3 L. Ed. 735.) See, also, *Beatty v. Kurtz*, 2 Pet. 566, 7 L. Ed. 521, and *Vincennes University v. Indiana*, 14 How. 268, 14 L. Ed. 416."

See, also, *Russell v. Allen*, 107 U. S. 163-167, 2 Sup. Ct. 327, 27 L. Ed. 397; *Werlein v. New Orleans*, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. Ed. 817; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *St. Peter's Church v. Brown*, 21 R. I. 367, 43 Atl. 642; *Lewis Estate*, 1 Pa. Dist. Ct. R. 423; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Washburn v. Sewall*, 9 Metc. (Mass.) 280; *Swazey v. Am. Bib. Soc.*, 57 Me. 523; *Trenton Soc. v. Howell*, 63 Atl. (N. J.) 1110; *Miller v. Chittenden*, 4 Iowa, 252; *Hornbeck v. Am. Bible Soc.*, 2 Sandf. Ch. 133; *Paschal v. Acklin*, 27 Tex. 173; *Pennoyer v. Wadhams*, 20 Or. 274, 25 Pac. 720, 11 L. R. A. 210.

In *Schmidt et al. v. Hess et al.*, 60 Mo. at page 595, the rule is laid down as follows:

"No doubt is entertained that the gift under consideration is a charity, and falls within the meaning of the rules of chancery. (2 Sto. Eq. Jur. sec. 1164, and cases cited.) And, although in consequence of the nonincorporation of the church for whose benefit the grant was made, there was no one *in esse*, at the time of making the donation, capable of being the recipient of the trust, yet, the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation. (2 Sto. Eq. Jur. secs. 1165, 1166, and cases cited; *Potter v. Chapin*, 6 Paige N. Y. 639, and cases cited; *St. Louis County Court v. Griswold*, 58 Mo. 175.)"

In considering the question involved here, it is said in 6 Cyc. 903:

"They are construed as valid when possible, and are often upheld where private trusts would fail. A gift in trust for a charity not existing at the date of the gift and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that probably will not happen within a life or lives in being and twenty-one years afterwards, is valid if there is no gift of the property meanwhile to or for the benefit of any private person. In consequence of such favor, gifts of this character are sustained, though vaguely expressed, and when a gift is clearly for a charitable use, the trustees named therein take the legal estate in fee, though the deed does not in terms run to their heirs and assigns; and though the instrument of gift makes no provision for the conveyance to trustees, the donated property becomes immediately charged with the trust in the hands of either the executors or heirs. Equity will not permit these trusts to fail because its particular purposes are uncertain, or for want of a trustee, though no existing donee is named, from which it results at common law that though the gift to a charitable use is to a voluntary association or an unincorporated society which is uncertain, indefinite, and fluctuating in its membership, the court will nevertheless, under the common-law rule, at least uphold it and appoint a trustee to take and administer the fund according to the terms of the grant."

The most recent decision sustaining our position is that of *In re Upham's Estate*, 127 Cal. 90, 59 Pac. 315, from which we quote:

"It is contended, however, that the trust is void because the parties named as trustees are incapable of taking the property. The trustees of the orphans' home, it is true, do not constitute a corporation. It was organized under the auspices of the Grand Lodge of the Independent Order of Good Templars of the State of California, which is a corporation, and it is under the management and control of a continuous board of trustees, consisting of eight persons, one-half of whom are selected every two years by the order. These trustees seem to be appropriate

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persons to take charge of this charitable fund, and manage it for the purposes of the trust; but, even if it should be held that in a strict legal sense they are not capable of taking, yet the charity would not fail for that reason. A court will not allow a charitable trust to fail for want of a legal trustee. Of course, in this country courts of equity will not go so far in executing indefinite charities as the courts of equity went in England under the statute of 43 Elizabeth, for there, if it could be discovered from a deed or will that anything in the nature of a charity was intended, however vague or indefinite, the chancellor would devote it to some sort of a charity. But in this country courts have been extremely liberal in construing charities, and under principles analogous to the doctrine of *cy-pres* have enforced trusts far more indefinite and inexact than the one here involved."

4. We are of the opinion that not only is the contention of appellants sustained by the great weight of authority but by sound reason as well, and, in view of the fact that the lot was given to the society in consideration of the locating in the vicinity of the lot in question of the Chinese inhabitants of Reno, and of the making of the improvements which were made by the society upon the lot, that equity and good conscience should for all time close the mouth of Manning and his grantees to assert the incapacity of the society to take title to the property in question.

It is ordered that the judgment be reversed, and that the case be remanded for a new trial.

MCCARRAN, J.: I concur.

NORCROSS, C. J.: I dissent.

Argument for Appellant

[No. 2214]

**BESSIE MILLER, RESPONDENT, v. W. B. THOMPSON,
APPELLANT.**

[160 Pac. 775]

1. PLEADING—AMENDMENT—PRAYER.

Under Rev. Laws, 5081, providing that where the variance is not material, a finding according to the evidence or an immediate amendment may be ordered, amendment of prayer of the complaint may be allowed at conclusion of plaintiff's case.

2. CONTRACTS—VALIDITY—IMPOSSIBILITY OF PERFORMANCE—MISTAKE.

The contract whereby plaintiff abandons public lands, on which she has located mining claims, in consideration of the payment to her by defendant of \$100 a month, till sale of 160 acres of the land, and agreement of defendant to make application for withdrawal, under the Carey Act (Act of Aug. 18, 1894, c. 301, 28 Stat. 372) of said lands and other lands, and to appropriate and develop them thereunder, the same to be sold, and a fifth of the proceeds of sale to be paid to plaintiff, is void as impossible of performance, and made under a mutual mistake; said act not allowing of sale of withdrawn land by the one withdrawing it, but only development of an irrigation system and sale of water therefrom to settlers, who make entry on the land and buy it from the state.

APPEAL from First Judicial District Court, Ormsby County; *Frank P. Langan*, Judge.

Action by Bessie Miller against W. B. Thompson. Judgment for the plaintiff, and the defendant appeals. **Reversed.**

C. O. Whittemore and Platt & Sanford, for Appellant:

The court erred in permitting the plaintiff on the day of the trial to amend her complaint without notice to the defendant or adverse party, or to his attorneys. (Rev. Laws, 5084.) Plaintiff has secured a judgment in this case without a semblance of allegation in her amended pleadings entitling her to a recovery as prayed for in the amended prayer of the amended complaint. "It is error to render judgment against a party who is made defendant by amending a complaint without giving him an opportunity to answer." (*Mears v. James*, 2 Nev. 342; *Weir v. Washoe H. & S. Co.*, 31 Nev. 528.) "A complaint cannot be altered in a material part thereof without

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notice to defendant. Especially, it cannot be so altered as to set out a new and distinct cause of action." (*Keller v. Blasdel*, 2 Nev. 162; *Ogle v. Miller*, 128 Iowa, 474, 104 N. W. 502; *Linott v. Rowland*, 119 Cal. 452, 51 Pac. 687; *Schultz v. Loomis*, 40 Neb. 152, 58 N. W. 693.)

The trial court could not properly execute, assign, and adopt the findings and conclusions of law filed in the case, the findings being unsupported by the allegations of the original complaint and cause of action therein stated, and being inconsistent therewith.

The contract entered into was an unconscionable contract, and could not be enforced either at law or in equity. It pretends to call for the payment of moneys on the part of the defendant, his executors, administrators, successors and assigns forever, and without restriction or limitation as to all, and pretends likewise to permit the plaintiff to enforce the collection of moneys in monthly installments from the defendant forever, and without limitation or restriction as to time; likewise, pretends to pass this pretended right and privilege on to her successors, executors, administrators and assigns. "The insurmountable obstacle in the way of affirming the judgment, however, lies in the fact that it cannot stand the test of an application of equitable principles, but, on the contrary, is absolutely unconscionable." (*Gamble v. Silver Peak*, 34 Nev. 351.)

H. C. Price, for Respondent:

The amendment allowed to the complaint in no wise changed the issues involved, the cause of action being based upon a continuing contract, and the defendant's answer admitting that, by the terms of the writing set out in the complaint, he was to make monthly payments to plaintiff until the time of the sale of any of the lands mentioned in the contract. The statute provides for amendments to conform to the proofs. (Rev. Laws, 5080, 5081.) The law neither does nor requires an idle act, and it would be idle to require notice or a trial *de novo* when the subject-matter of the amendment has been

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gone into upon the trial. (*Maionchi v. Nicholini*, 82 Pac. 1052; *Ramboz v. Stansbury*, 13 Cal. App. 649, 110 Pac. 472.)

If the appellant felt that the amendment raised issues not raised by the original pleadings, he should have asked to have the case reopened for the purpose of trying the new issues. Error cannot be predicated on the allowance of such an amendment unless this was done. (*Jackson v. Jackson*, 27 Pac. 957; *Ennis Brown Co. v. Hurst*, 82 Pac. 1060.)

It was proper to allow the prayer of the complaint to be amended to conform to the amount found to be due under the contract. Where an amendment might have been allowed to cure a variance, the judgment will not be disturbed because no formal amendment was made. (*Kuhn v. McKay*, 49 Pac. 473; *Johnston v. Farmers' Ins. Co.*, 106 Mich. 96; *French v. McCarthy*, 58 Pac. 154.) Amendments to pleadings to conform to evidence given without objection is permissible. In such cases they may be considered so amended. (*Westland Pub. Co. v. Royal*, 79 Pac. 1096; *Cureton v. Cureton*, 48 S. E. 162; *Tyler v. Bowen*, 100 N. W. 105; *Goldsmith v. Golland Bldg. Co.*, 81 S. W. 1112; *Hetzel v. Easterly*, 89 N. Y. S. 154.)

The court may grant any relief consistent with the case made and embraced within the issue when defendant has answered. (Rev. Laws, 5241.)

The contract in question was not an unconscionable contract. To make it such, there must have been either fraud, misrepresentation, accident, mistake, folly, or ignorance. "A contract is not invalid, nor is the promisor discharged, merely because it turns out difficult, unreasonable, dangerous, or burdensome." (9 Cyc. 625.) "Where the contract becomes impossible subsequent to the making of the contract, the general rule is that the promisor is not therefore discharged." (9 Cyc. 627.) "Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." (9 Cyc. 728.)

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By the Court, MCCARRAN, J.:

This is an action on contract. It appears from the record that the plaintiff had located mining claims on the open public domain in Fish Lake Valley, in Esmeralda County, Nevada, the land embraced within the claims amounting to some 65,000 acres.

The contract entered into by the parties and on which this action is founded was in part as follows:

"That for and in consideration of the sum of one hundred dollars (\$100) in hand paid by the second party to said first party, the receipt whereof is hereby acknowledged, and other valuable considerations passing from second party to first party, and the further payment to first party by second party of the sum of one hundred (\$100) per month, on or before the first day of each and every month, beginning May first, 1912, during a period of time hereinafter fixed, said money to be placed to the credit of first party in the First National Bank of Los Angeles, California; and in further consideration of the terms and conditions hereinafter expressed, said first party hereby agrees to relinquish, release and abandon certain mining claims and tracts of government land situated in Fish Lake Valley, Esmeralda County, State of Nevada, approximating sixty-five thousand (65,000) acres, the abandonment of said lands having been placed in the hands of second party at the time of the signing of this agreement.

"As a further consideration for this agreement, said second party hereby agrees to make application under the law known as the 'Carey Act,' in the State of Nevada, for withdrawal of all of said lands so relinquished and abandoned by first party and her associates, and also to make application for withdrawal under said Carey Act of certain other tracts of land in said Fish Lake Valley, Esmeralda County, State of Nevada; the whole of said lands so applied for to be approximately one hundred thousand (100,000) acres more or less; and in the event such application is approved by the proper state and

United States government officials, said second party shall appropriate and develop such of said lands as he deems practical and capable of development, according to the provisions of said Carey Act; the same to be sold and disposed of to the best ability of the parties hereto; and said first party hereby agrees to use her best endeavors to assist second party in the sale of said lands and the promotion of the enterprise herein provided for, she to receive no commission on sales made by her, it being hereby agreed that second party shall be allowed such agents' commissions as he deems necessary and advisable to be paid in making sales of said lands, no part of such commissions to be paid by first party.

"It is expressly provided that the second party shall have the full and complete control and management of said business and the enterprise provided for herein and the right to make such disposition of any and all of said lands as he deems best, provided, however, that he shall pay to first party one-eighth of any and all money received from sales of land procured under this agreement, or its production, and that a monthly accounting shall be rendered by second party to first party of all sales made, and the money coming to first party under said accounting shall be placed monthly to her credit in the First National Bank of Los Angeles, California.

"It is further agreed that the payment of one hundred dollars (\$100) per month by second party to first party, hereinbefore provided for, shall cease at the time of the sale of any of the aforesaid lands amounting to one hundred sixty acres (160). * * *

"It is further agreed that all of the terms and conditions herein expressed shall be binding upon both of the parties hereto and upon their and each of their heirs, executors, administrators and assigns."

1. Two questions are presented in the case at bar, one having to do with the right of the plaintiff in the court below to amend the prayer of her complaint at the conclusion of the presentation of her case and before the

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judgment was entered. The other, which we deem the more serious, is that the evidence is insufficient to warrant the judgment and decree of the trial court.

In so far as the question of the right of the court to admit of the amendment to the prayer of the complaint is concerned, the action of the court in this respect comes under the rule, which we believe well supported by authority, that a pleading may be amended so long as the facts alleged as the basis of the recovery remain the same, so that a new cause of action is not interposed; and under this rule a pleading may be amended by amending the prayer so as to enlarge or modify the extent of the relief sought. (*Johnson v. White Mountain Creamery Assn.*, 68 N. H. 437, 36 Atl. 13, 73 Am. St. Rep. 610; *Rettig v. Newman*, 99 Ind. 424; *Western Union Telegraph Co. v. Brown*, 62 Tex. 536; *Hogueland v. Arts*, 113 Iowa, 634, 85 N. W. 818.)

The section of our code applicable to the matter (Rev. Laws, 5081) provides:

"Where the variance is not material, as provided in the next preceding section, the court may direct the fact to be found according to the evidence, or it may order an immediate amendment, without costs."

In the case of *Buckley v. Buckley*, 12 Nev. 423, this court held in substance that, when the facts alleged in a supplemental pleading occurred after the original pleadings were filed and were consistent with and in aid of the original pleadings and did not bring into the case any new cause of action or any controversy that was not in fact included in the issue originally made, supplemental pleadings should be allowed if asked for, so as to protect the rights of the respective parties.

The basis of the controversy in the matter at bar was the contract, which was of a continuing nature. The amount due on the contract at the time of the filing of the complaint was, by reason of the very nature of the contract itself, less than that which would have accumulated by reason thereof at the time of the rendition of judgment. It was not a new cause of action nor a cause

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of action based upon a new or distinct ground. It was the same cause of action based upon the same instrument.

In the case of *Maionchi v. Nicholini*, 1 Cal. App. 690, 82 Pac. 1052, the Supreme Court of California, under code provision quite similar to ours, held that the court might direct a fact to be found according to the evidence, and may order an amendment to the original pleading sufficient to cure an immediate variance, and which would make the pleading conform to the proof; further, that this might be done without serving a copy upon the adverse party or his attorney, providing, however, that the adverse party was not actually misled by such amendment to his prejudice.

This same principle was discussed in the case of *Ennis Brown Co. v. Hurst*, 1 Cal. App. 752, in the same volume of the Pacific Reporter at page 1059, wherein the court held that it was proper for the trial court to permit of an amendment to the complaint after the evidence had been closed and the cause had been submitted and taken under advisement and before decision; and to the same effect is the case of *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955.

In the case of *Ramboz v. Stansbury*, 13 Cal. App. 649, 110 Pac. 472, it was held that, when in the trial of a cause evidence was offered as to subject-matter of an amendment subsequently made to the complaint, the court did not abuse its discretion in permitting such amendment where such would conform to the proof.

In the case of *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154, the Supreme Court of California, having under consideration a matter of contract, held that, where the defendant appears and answers in an action on a contract, the terms of which are set forth in the complaint, and there is a want of conformity between the prayer of the complaint and the facts set forth, the court is authorized to permit an amendment at the trial by inserting a larger sum in the prayer.

The case of *French v. McCarthy*, *supra*, presented a problem affecting an amendment to the prayer of a complaint in an action where a contract continuing in its

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nature was involved, and where, after the action had been commenced, additional payments were made on the contract so as to involve a sum in excess of that due and owing on the contract at the time of the commencement of the action.

In the case of *Finnegan v. Ulmer*, 31 Nev. 523, 104 Pac. 17, this court, in quoting from its former decision in the case of *McCausland v. Ralston*, 12 Nev. 202, 28 Am. Rep. 781, affirmed a rule which we think applicable to the case at bar, wherein it said:

"Courts in allowing pleadings to be amended are necessarily clothed with discretionary powers which cannot, owing to the varying circumstances of each particular case, be governed by any general rule. The vital question is whether the court has grossly abused its discretion in this respect, or whether, by the allowance of the amendments, manifest injustice has been done to appellant."

The amendment allowed by the court, and which was to the prayer of the complaint, introduced no new allegations, made no additional parties, did not complicate the suit, nor increase the expense of litigation, nor did it make new issues of fact or incumber the record. Early authorities on the subject of pleading addressed themselves to the subject thus:

"If the bill be found defective in its prayer for relief, or in proper parties, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, the amendment is usually granted. But the substance of the bill must contain ground for relief." (*Lyon v. Tallmadge*, 1 Johns. Ch. N. Y. 184.)

2. Does the evidence support the judgment and decree of the trial court? It is the contention of appellant here that the contract in question was one which by its very terms made performance impossible, and that the contract was unconscionable. Moreover, it is contended that the contract was void, inasmuch as there was a want of consideration.

We may say at the outset that the conditions and

terms imposed by the contract are, if not rare, at least unusual and novel. The plaintiff, respondent here, had located a vast tract of the open public domain by means of mining locations. These locations, being made under the authority of a federal statute applicable to the subject and pursuant to state laws in conformity therewith, contemplated at the very outset the mineralized character of the land covered by the locations. Indeed, it would be difficult for one to even imagine that respondent would assert that these claims were on other than mineralized domain, for the mere assertion of such a contention would of itself defeat the right of respondent to locate the territory under the mining law. The validity of each claim located by respondent depended upon the discovery of mineral. (*Overman S. M. Co. v. Corcoran*, 15 Nev. 149; *Golden v. Murphy*, 31 Nev. 395, 103 Pac. 394, 105 Pac. 99.)

The act of making a location and the maintenance of the same upon the public lands looks for its validity to the assertion of the locator that the same is mineralized, and that the discovery of mineral has been actually made. (*Golden v. Murphy, supra.*)

For the maker of a mining location to declare that the territory embraced within the lands of his location was nonmineral in character would be the equivalent to declaring his location to be null and void, and his right to possession, use, or occupancy of the public domain under the mining laws of the land would automatically cease.

The contract here in question was one which to our mind indicates a joint adventure entered into by the parties for mutual gain, and this to be acquired from the sale and disposition for agricultural purposes of the very lands to which respondent here claimed title under her declaration that she held a valid location based upon the discovery of mineral.

The agreement entered into provides that:

"As a further consideration for this agreement, said second party hereby agrees to make application under the law known as the 'Carey Act,' in the State of Nevada,

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for withdrawal of all of said lands so relinquished and abandoned by first party and her associates; * * * and in the event such application is approved by the proper state and United States government officials, said second party shall appropriate and develop such of said lands as he deems practical and capable of development, according to the provisions of said Carey Act; the same to be sold and disposed of to the best ability of the parties hereto."

The contract further provided that the appellant here, the second party to the instrument, should pay to the first party one-eighth of any and all money received from sales of land procured under the agreement.

It might be well at this juncture to note that the act of Congress known as the Carey Act (Act Aug. 18, 1894, c. 301, 28 Stat. 372), and that under which the parties here were to carry out the provisions of their contract, is one enacted "to aid the public-land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers." (28 Stat. L. 372, 422, sec. 4.) The act was passed that its provisions might be in furtherance of a former act of Congress entitled "An act to provide for the sale of desert land in certain states and territories." (Act March 3, 1877, c. 107, 19 Stat. 377, U. S. Comp. St. 1913, secs. 4674-4676.) The act, among other things, provides that the land may be withdrawn from the public domain and segregated to the state under rules and regulations prescribed by the secretary of the interior. The law itself, as well as the regulations prescribed by the secretary of the interior, provide, among other things, that an application for the withdrawal of the lands from entry and their segregation under the act shall be accompanied by an affidavit, based upon personal examination, that the lands sought to be withdrawn are desert in character as contemplated by the Carey Act, and are nonmineral. Hence we have here a rather anomalous situation presented by the contract in question, in which the respondent, plaintiff in the court

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below, set up as a valuable consideration the abandonment of a right to the control and possession of public domain under the assertion that the same was mineral in character. This abandonment, however, the sole and only consideration on the part of respondent, was made in furtherance of a scheme in which, according to the terms of the contract, she was jointly interested, the success of which scheme depended upon the nonmineralized character of the very land which she claimed to relinquish. If the public domain over which respondent's mining claims were located was nonmineral, then she had no right or claim or title, under the mining laws, to the land embraced within her claims. If the territory covered by the mining claims was mineralized in character, it was impossible to carry out the scheme contemplated by the contract, in which scheme she was jointly interested and by the success of which alone she could claim anything from appellant herein. If the land in question was nonmineral, respondent had no right to control or possession of the territory covered by the claims; hence she conveyed nothing of value as a consideration. If the land was mineral in character, that of itself *ipso facto* defeated the scheme and made the thing sought to be carried out under the contract impossible; hence performance by the appellant was impossible.

That the contract is void as being impossible of complete execution is made manifest when we view it from another angle. The contract provides for the payment of \$100 per month to respondent by appellant; said payments to continue during a period of time as fixed by a specific section of the contract which reads as follows:

"It is further agreed that the payment of \$100 per month by said second party to first party, hereinbefore provided for, shall cease at the time of the sale of any of the aforesaid lands amounting to 160 acres."

The contract, among other things, provides:

"The whole of said lands so applied for to be approximately 100,000 acres more or less; and in the event such

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application is approved by the proper state and United States government officials, said second party shall appropriate and develop such of said lands as he deems practical and capable of development, according to the provisions of said Carey Act, the same to be sold and disposed of to the best ability of the parties hereto."

By the act of Congress known as the Carey Act, no land is acquired by any person, company, or corporation, unless (if a natural person) he should become an entryman, in which case 160 acres would be the maximum acreage such entryman might acquire. The Carey Act by its several provisions contemplates the establishment and perfection of reclamation projects, the same to supply water for the irrigation of a given tract of land, and, when completed, the person, whether natural or artificial, conducting the same, derives his or its profits from the sale of the water rights to actual settlers on the lands covered by the reclamation project. The act provides for temporary withdrawal of the public lands from entry. An application for a temporary withdrawal of lands under the provisions of the act means that the applicant proposes to irrigate the lands requested to be withdrawn from public entry and desires time to make the necessary surveys, maps, plats, determinations, and specifications to comply with the government requirements. The object of the temporary withdrawal is to protect the applicant from interference by persons attempting to acquire lands within the project other than through the procedure established for Carey Act projects. One who seeks to carry out a reclamation project under the Carey Act must file with the state engineer of the State of Nevada an application for a water right commensurate to the acreage sought to be reclaimed. (Rev. Laws, 3068.) The effect of the temporary withdrawal is to withhold the lands for one year from entry under public-land laws.

One who seeks to perfect a project under the Carey Act, as we read the law, has nothing whatever to do with the sale or disposal of the land covered by the project.

When the irrigation system is in condition to deliver water to settlers, the price at which water rights will be sold to such settlers having been fixed by contract between the State Carey Act Commission and the party in charge of the project (Rev. Laws, 3071), the lands are thrown open for entry and allotment of not exceeding 160 acres to each entryman. The payments for the land are made by the entryman to the state, and the patent issued for the land is from the state to the entryman. The right to the use of the water, and not the land, is sold by the party perfecting the project to the actual settler. (Stats. 1911, p. 84; 28 Stat. L. 372-422.)

A contract to do a thing which cannot be performed without a violation of the law is void, whether the parties knew the law or not. (6 R. C. L. 694.)

The contract here in question assumes the carrying out of a scheme made impossible by the very law under which the scheme was to be perfected. If we read the contract correctly, it assumes the right of the parties to sell and dispose of the land and acquire a profit from such sale and disposition. The right of sale is expressly reserved by the federal statute to a third party, namely, the state. If the contract had contemplated the development of an irrigation system and the sale of the water therefrom to settlers upon the public domain under the system, the contract would have assumed the performance of that which under the law was within the power of the contracting parties.

It may, we think, be safely said that the contract here in question assumed the existence of an essential fact, namely, the right of one or both of the parties to sell and dispose of the lands under the law known as the Carey Act. This was a false assumption, and a contract based upon such has been said to be one where there is no meeting of the minds in reality, and hence no contract. (*Nordyke & Marmon Co. v. Kehlor*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600.)

The obligation imposed upon the appellant herein to

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pay to the respondent the sum of money specified until the first sale of 160 acres had been accomplished contemplated a termination of the obligation by an incident made impossible by law. If the contract had provided that the sum specified should be paid to respondent each month until the first entryman had filed upon the land under the project, or until the first entryman, having filed on 160 acres under the project, had assumed the obligation of paying for the water for 160 acres, or until the first entryman had made payment to the state, or until the first entryman had paid for water for the first 160 acres, then, under either of these, a condition might be presented capable of accomplishment by one or both of the parties. The contract here in question was subject to implied conditions incapable of performance by respondent or by the joint efforts of the parties, and hence unenforceable. (*Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 491.) This condition arose not by subsequent acts or conditions, but was embodied into the very contract itself at the time of its making, inasmuch as the terms of the contract were made impossible by operation of the law which the contract itself sought to put in motion.

It will not be assumed from the language of the contract that it was the intention of the parties at the time of making the instrument that the appellant was to pay to respondent a sum of money each month indeterminate as to time. It is rather to be concluded that the intention of the parties was to terminate the payments on the transpiring of an event, to wit, "at the time of the sale of any of the aforesaid lands amounting to 160 acres."

Through an ignorance of the law, the parties may have believed, at the time of making this contract, that such an act was possible. But inasmuch as the sale and disposition of the land was not a matter within the control or regulation of either of the parties, but rather a matter solely within the power of a third party—the state—the conditions under which the respondent here might have

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carried out the obligations imposed by the contract were not within his control. It would appear here as though the agreement was founded upon a false conception as to the law under which its terms were to be carried out and upon the operation of which law performance was contingent. This precludes the idea of a meeting of the minds. A contract or agreement founded on a false conception as to a matter or thing then existent is null in so far as it may be operative against the party who misconceives. (*Frevall v. Fitch*, 5 Whart. Pa. 325, 34 Am. Dec. 558.)

It has been said that where a contract was made under a mistaken idea or belief that future legislation would be enacted, which legislation was never enacted, and the failure for the enactment of the same was not imputable to either of the parties, the contract is not enforceable. (6 R. C. L. 620.) If this rule is applicable to legislation not yet enacted, it is equally applicable to laws in existence at the time of the making of the contract, the effect of which makes the conditions of the contract legally impossible of accomplishment.

In the case of *Miles v. Stevens*, 3 Pa. 21, 45 Am. Dec. 621, the Supreme Court of Pennsylvania gave expression to that which we find to be a general rule, namely, that if the agreement in question was made under a mistaken impression that facts essential to the contract did exist or would afterwards exist, and if the contracting parties were prevented from performing by causes over which the parties had no control, the contract is unenforceable. There the court said:

"We perceive no distinction either in principle or authority, where the parties contract, either with a view to existing facts, or facts merely in contemplation between the parties, dependent on future events or contingencies. In either case, when the basis of the contract fails without the assent of the parties, to attempt to enforce the agreement is inequitable."

The principal thing in the minds of the contracting

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parties, as disclosed from the very language of the contract itself, was the sale and disposition of lands which at the time of the making of the contract were of the open public domain of the United States. It was the accomplishment of the ultimate purpose of the contracting parties, namely, the sale of the land, which was to terminate the obligation imposed upon appellant here. They were mistaken when they assumed that either of the parties might sell or dispose of the public domain under the law known as the Carey Act. They were mistaken when they assumed that the Carey Act, the law which their joint venture was to set in motion, permitted the sale of the land by the individuals, associations, or corporations at whose instance the land would be withdrawn from public entry. In our judgment we assert a correct rule of law, fairly applicable to the matter at bar, when we say that where certain facts assumed by both parties to a contract are the basis of the contract, and it subsequently appears that such facts do not exist, or by a law then existent are made impossible or inoperative, the contract is void. (*Fink v. Smith*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750.)

In 6 Ruling Case Law, at page 621, we find a statement which we believe well supported by authority, to the effect that if an agreement is induced by a mistake common to both parties, without which mistake the agreement would not have been made, and the mistake was in respect to the subject-matter of the contract, the agreement is inoperative and void. "This rule," says the authority, "which has been adopted as a part of the common law, is based upon the idea that in such cases no contract has been consummated, that the minds of the parties have never met in respect to the real subject-matter of the contract. It is not a case of a mere failure of consideration, for that implies the existence of a contract, while a mutual mistake prevents the existence of one."

Where parties assume to contract, and there is a mistake

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as to the existence of a subject-matter, it is, we think, a correct statement of the law that under such conditions there is no contract because of the want of mutual assent necessary to create one.

We quote from 6 Ruling Case Law, p. 621, that which we deem applicable to the matter at bar, to the following effect:

"If by mutual mistake a contract is founded upon a condition impossible of performance because of the assumption of the existence of a fact which cannot exist, and its adoption by both parties as the sole standard by which to test the performance of the condition, the contract cannot be enforced, and it is immaterial who furnished the information upon which the condition is predicated, or that the person pleading the mistake had the means of discovering it, or by care and diligence might have avoided it." (*Nordyke & Marmon Co. v. Kehlor, supra.*)

It is unnecessary for us to dwell upon the motion to strike or the motion to dismiss the appeal, inasmuch as the matter touched upon in our decision and by reason of which we conclude that a reversal must ensue is a matter appearing upon the face of the judgment roll. The pleadings in the case are properly a part of the judgment roll, and the contract in question being an essential part of the pleadings in this case, it was unnecessary for us to go further than to determine the fact as to whether the judgment was supported by the pleadings. Our conclusion in the matter is arrived at from the judgment roll alone. Hence it was unnecessary for us to consider any of the phases of the appeal that might have been affected by the motion to strike. The motion to dismiss the appeal was not well taken as against the appeal from the judgment alone, inasmuch as the time for such an appeal had not expired.

The judgment is reversed.

It is so ordered.

NORCROSS, C. J.: I concur.

Coleman, J., concurring

COLEMAN, J., concurring:

While I concur in the order of reversal, I cannot agree with the interpretation put upon the contract in question by the court, as expressed in the following language:

"For the maker of a mining location to declare that the territory embraced within the lands of his location was nonmineral in character would be equivalent to declaring his location to be null and void, and his right to possession, use, or occupancy of the public domain under the laws of the land would automatically cease."

In my opinion, there is not one word in the contract to justify this construction. Whether the mining claims mentioned in the contract were located as lode mining claims or as placer claims, for oil or other minerals, does not appear. It is a well-known fact that there have been many thousands of acres of land located and patented as mineral or nonmineral that might have been, with propriety, located and patented as of the other class. In some instances land has been held to be mineral by the courts and agricultural by the land department, both tribunals acting upon substantially the same evidence. A striking example of this was brought to our attention in the recent case of *Earl v. Morrison*, 39 Nev. 120, 154 Pac. 75. Suppose in that case the locator under the scrip (who finally prevailed), realizing the delay, enormous expense, and other inconveniences incident to prolonged litigation both in the courts and before the land department, had entered into an agreement with the placer locators, whereby it was agreed that they should cancel their scrip locations and permit the placer locators to proceed to patent without contest, upon the condition that the placer locators might work the land for mineral, and that the scrip locators might cultivate it, each so operating as not to interfere with the other, and that after all the mineral was exhausted the land should be conveyed in fee to the scrip locators, would any one say that there would be no consideration for the canceling of the scrip location? I think not.

Suppose Jones and associates should locate a tract of

Coleman, J., concurring

land as a placer claim for the purpose of mining for oil. The land has all the indications that oil can be found by prospecting. They are all poor men. Shortly after the oil locations are made, Brown and associates, men of wealth, come along and say to Jones and associates:

"The land which you have located for oil will grow fine alfalfa, and there is a large stream of water near by with which it can be irrigated. We are going to town and enter the land under the Desert Act and appropriate the water for irrigation purposes. Now, we do not care for the oil, and, if you will abandon your locations for oil, we will patent the land under the Desert Act and enter into a contract with you that you may go upon the land and prospect for oil as soon as we get our patent, and that your operations shall be without hindrance from us."

Jones and associates, having no money with which to litigate, and knowing that some of the best agricultural land in the world produces the highest quality of oil, accept the proposition, abandon the placer location, and Brown and associates procure their patent. Jones and associates go upon the premises, put down a well, and get oil. Brown and associates eject them. Would any one say that Jones and associates would have no remedy? What is the difference between the supposed case and the one at bar?

We will suppose another case. John Smith, a poor prospector, with barely sufficient resources to maintain his existence while developing his property, locates ground as a placer mining claim, which has all the indications to justify its location as such, and ninety days thereafter opens up within its boundaries a true fissure vein of high-grade gold ore. Three days after opening up this fissure, John Doe, a wealthy man, goes upon the property and locates the fissure vein in his own name. John Doe goes to John Smith and says:

"The vein which I have located on your placer was a 'known vein' at the time you located your placer claim, though you may not have known of its existence. It having been a known vein, you cannot hold it under your

Coleman, J., concurring

placer location; but I do not want a lawsuit with you. Now, if you will abandon your placer location so that I can perfect patent to my lode location without litigation, I will give you an undivided one-third interest in my lode claim."

Smith, being a poor man, accepts the proposition, and a written agreement is entered into accordingly, whereupon the placer location is abandoned and a relocation of the lode claim, so as to take in all the ground allowed by law, is made by Doe, and the claim is patented in his name. But thereafter he refuses to acknowledge any rights in John Smith because he had abandoned his placer location to enable Doe to acquire title to a valuable lode claim. Is it not clear that a court of equity would compel John Doe to do equity? We think it is. So far as appears in the record, the case at bar is not materially different from either of the supposed cases.

I cannot agree with the view expressed that the agreement entered into between the parties indicates a joint adventure. A joint adventure is nothing more nor less than a partnership limited to a single transaction. In other words, to constitute a joint adventure there must enter into the undertaking the elements of a partnership, such as a sharing of the losses and of the profits. There is nothing of that kind in this case. While respondent was to assist in promoting the project, she was not to participate in the profits. She was to receive a monthly payment which was not made contingent upon there being profits.

As to the position taken in the opinion of the court, that the contract is void because it was impossible to complete performance, I need only to say that there is no doubt but that the contract is incapable of performance according to its letter, for the reason that no land withdrawn pursuant to the terms of the Carey Act can be sold by the state, and not for more than \$1 per acre. When we consider this fact, and the further fact that in projects of this character the law permits the promoter

Points decided

to sell to the purchasers of land a perpetual right to water to be appropriated for use upon the land, we are inevitably forced to the conclusion that it was the intention of the parties that the right to the payment in question should turn, not upon the sale of 160 acres of land, but upon the sale of a water right for 160 acres of land.

If we were to undertake to ascertain the real intention of the parties to the contract, I think we might take into consideration the subject-matter of the contract, the existing federal and state statutes, the situation of the parties at the time of its execution, and all other surrounding facts and circumstances. If this view is correct, the question arises as to whether or not the contract is capable of reformation so as to be made to read in accordance with the intention of the parties.

Per Curiam:

Petition for rehearing denied.

[No. 2235]

LLOYD ASPINWALL, APPELLANT, v. ELIZABETH
ROOSA ASPINWALL, RESPONDENT.

[160 Pac. 253]

1. DIVORCE—JURISDICTION—COMPLAINT.

Under Stats. 1915, c. 28, sec. 1, providing that divorce may be obtained by complaint to the court of the county in which the cause therefor accrued, or in which defendant shall reside or be found, or in which plaintiff resides, if the parties last cohabited there, or in which plaintiff shall have resided for six months, the complaint of a husband, not alleging his residence in the county, but merely that he is now therein, does not bring his status within the jurisdiction of the court, the matrimonial domicile of the parties being in another state, and the marital offenses complained of being such as might have been determined by the courts of the matrimonial domicile, though the complaint alleges that defendant can be found in and is a resident of the county, the right of the wife to acquire another domicile separate from him, where their unity is dissolved, not availing him.

APPEAL from Second Judicial District Court, Washoe County; *R. C. Stoddard*, Judge.

Argument for Respondent

Action by Lloyd Aspinwall against Elizabeth Roosa Aspinwall. From an order dismissing the action plaintiff appeals. **Affirmed.**

George Springmeyer, for Appellant:

Where a plaintiff is a resident of the state and the defendant is found and served within the jurisdiction, the court has jurisdiction regardless of the length of plaintiff's residence. So long as the *res* is within the jurisdiction, the length of plaintiff's residence is immaterial, provided the parties are both found within the jurisdiction. If one party to a status can avail himself of the benefit of a court, so can the other party. (*Tiedemann v. Tiedemann*, 35 Nev. 259, 36 Nev. 494.)

"A statute may permit an action by a nonresident plaintiff against a resident defendant. (*Watkins v. Watkins*, 135 Mass. 83; *Smith v. Smith*, 4 D. C. 255.)" (*Tiedemann v. Tiedemann*, *supra*.) Only one of the parties is required to be domiciled within the state. (*Fitzpatrick v. Fitzpatrick*, 175 S. W. 444; *Bechtel v. Bechtel*, 101 Minn. 511; *Pawling v. Willson*, 12 Johns. 192; *Morgan v. Morgan*, 21 S. W. 154; 2 Bishop, Marriage, Divorce and Separation, sec. 119.)

The common and nearly universal statutes require a specified residence by the plaintiff in the state wherein he applies for a divorce. Of course, the legislature, being under no constitutional duty to grant a divorce at all, may establish limits beyond which the court must refuse it. But our legislature has seen fit to go further, and to grant the right to nonresident plaintiffs.

Hoyt, Gibbons & French, for Respondent:

The complaint in this action alleges no domicile within the State of Nevada on the part of the defendant. The lower court sustained the demurrer and dismissed the proceeding on the ground, among others, that the courts of Nevada had no jurisdiction of a divorce action where plaintiff was a mere transient within the state and was neither a resident within nor domiciled therein. No one,

not a resident of the state, either has the capacity to sue in the courts of the state for a divorce or to invest our courts with jurisdiction of such a cause. The matrimonial status can be brought before the court only by one domiciled within the jurisdiction of the court. (*Van Fossen v. State*, 37 Ohio St. 317.)

The statute simply declares the venue in divorce actions where jurisdiction otherwise exists, and does not confer jurisdiction. The constitution gives our district courts jurisdiction in all cases in equity, and an action for divorce is a suit in equity. (*Lyons v. Lyons*, 18 Cal. 447; *Sharon v. Sharon*, 67 Cal. 185; *Wadsworth v. Wadsworth*, 81 Cal. 182.)

The legislature established a venue for divorce actions where the plaintiff brought his status for determination before the court by making this state his domicile. (Wharton on Conflict of Laws, par. 209, *et seq.*)

It is a legal presumption that the domicile of the wife is that of the husband; the party relying upon the acquisition of another domicile by the wife must allege facts showing that she could legally acquire such domicile. (Wharton on Conflict of Laws, secs. 43, 45.) When the wife is a defendant, in the absence of justification on her part, she is to be regarded, for the purposes of the suit, as domiciled with her husband. (*Cheely v. Cheely*, 110 U. S. 701; *Hood v. Hood*, 11 Allen, 196; *Toker v. Gerold*, 157 Mass. 42; *Burlen v. Shannon*, 115 Mass. 438; *Burtis v. Burtis*, 161 Mass. 508; *Guest v. Guest*, 3 Ont. Rep. 344.) It is only where the husband is guilty of some matrimonial offense that the wife may acquire a separate domicile. (*Ditson v. Ditson*, 4 R. I. 87; Bishop on Marriage and Divorce, vol. II, sec. 127.)

Brown & Belford, Amici Curix.

By the Court, MCCARRAN, J.:

This was an action in divorce. The complaint in the action set forth:

"That the defendant, Elizabeth Roosa Aspinwall, is now

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living in and can be found in and is a *bona fide* resident of Washoe County, State of Nevada, and that plaintiff is now in said county; that substantial parts of this cause of action accrued in said Washoe County, State of Nevada."

Two causes of action are set up in the complaint in furtherance of plaintiff's prayer for a decree of divorce. The first cause of action is that of extreme cruelty resulting in mental anguish to the plaintiff, and so forth. The second cause of action is that of adultery, and the complaint in that respect alleges, on information and belief, acts of adultery committed by defendant in the town of Chatham, Morris County, State of New Jersey, and in the City of New York, State of New York, and at 700 Wheeler Avenue, in the City of Reno, State of Nevada, and elsewhere in the County of Washoe, State of Nevada.

A demurrer to the complaint was interposed by defendant, respondent herein, in which, among other things, the demurrant asserted the want of jurisdiction of the district court.

The matter being submitted on demurrer, the same was sustained by the court for want of jurisdiction. The plaintiff, appellant herein, declining to amend his complaint, an order was entered dismissing the action. From this order appeal is prosecuted to this court.

It will be observed that the complaint in this action makes no pretense at asserting either that the residence of the plaintiff was within this state, or that he was domiciled within the jurisdiction of the court. The plaintiff in the court below, appellant herein, sought to assert the jurisdictional prerequisite by alleging that the defendant, Elizabeth Roosa Aspinwall, "is now living in and can be found in and is a *bona fide* resident of Washoe County, State of Nevada."

Our statute applicable to the subject reads as follows:

"Divorce from the bonds of matrimony may be obtained, by complaint under oath, to the district court of the county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the

county in which the parties last cohabited, or in which the plaintiff shall have resided six months before suit be brought, for the following causes. * * * (Stats. 1915, p. 26.)

The appellant in this case relies upon the decision of this court in the case of *Tiedemann v. Tiedemann*, 36 Nev. 494, 137 Pac. 824. In that case the wife, Gertrude Eleanor Tiedemann, alleged in her complaint:

"I. That plaintiff is a resident of Carson City, Ormsby County, State of Nevada.

"II. That plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that said defendant is now within, and can be found in said county of Ormsby, and within the jurisdiction of this court."

The distinction between the allegations of residence contained in the complaint in the Tiedemann case and those found in the complaint in the case at bar must not be lost sight of in arriving at a correct application of the law of the case. In the matter at bar the husband, Lloyd Aspinwall, files his complaint, making no allegation or even attempted allegation of residence within this state or within the jurisdiction of the district court. In this respect the only averment in the complaint is "that plaintiff is now in said county." In the Tiedemann case the wife, as plaintiff, asserted her residence within the jurisdiction of the district court, and alleged grounds which would warrant the assumption of separate domicile.

We approach the consideration of the matters presented in this record in the light of legal doctrines quite well established. At common law it was a well-founded rule that a woman on her marriage loses her own domicile and acquires that of her husband. (*Barber v. Barber*, 21 How. 582, 16 L. Ed. 226; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530; Ann. Cas. 1912D, 400, note.)

While this general rule established at common law may prevail today, modern law and modern decisions have

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established at least one well-founded and well-sustained exception.

The Supreme Court of the United States, in the case of *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604, in answer to the proposition that the domicile of the husband is the wife's, and that she cannot have a different one from his, said:

"The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. (2 Bishop on Marriage and Divorce, 475.) The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and the domicile of the husband are of no consequence. (*Ditson v. Ditson*, 4 R. I. 87.)"

Eminent authority supports the proposition that under modern law the wife may acquire a domicile separate and distinct from that of her husband where the unity of the husband and wife is breached, as, for instance, where the husband has given cause for divorce (*Atherton v. Atherton*, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; *Frery v. Frery*, 10 N. H. 61, 32 Am. Dec. 395; *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88, Ann. Cas. 1912D, 395, note; *Duxstad v. Duxstad*, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. Rep. 1138; 9 R. C. L. 545), or where by mutual agreement there is a separation (9 R. C. L. 545), or where by the institution of divorce proceedings the dissolution of the unity is made manifest (*Jenness v. Jenness*, *supra*; *McGrew v. Mutual Life Insurance Co.*, 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20).

It may, we think, be safely asserted as an established proposition of law that, if the plaintiff is a *bona fide* resident of the state of the forum, the courts of that state may acquire jurisdiction to decree a divorce in his or her favor irrespective of the domicile or residence of the defendant. (9 R. C. L. 400.)

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In the case of *Tiedemann v. Tiedemann*, *supra*, this court held that an action for divorce may be instituted by a resident of the state in a court of the county, regardless of the residence of the defendant if it is alleged that the defendant can be found within the county where the suit is instituted and is actually served with process therein.

The residence of the wife, the defendant in the case at bar, even though the same might be within this state and within the alleged county, would, as we view it, avail nothing in the way of conferring jurisdiction where the plaintiff, the husband, was a resident of and domiciled in another state and made no pretense of asserting residence within this jurisdiction. The fixed domicile of the parties was the domicile of the husband, the plaintiff in this action. True, the wife might, under conditions heretofore referred to, establish a separate domicile, and, when the same was established under the laws of the state, she might sue for divorce, and thereby confer jurisdiction upon the courts of the state in which her new domicile was fixed; but such is not the case presented in the record before us. The matrimonial domicile of the parties in the case at bar was in another jurisdiction, and, in so far as the plaintiff in this action was concerned, he, claiming no residence or domicile within this state, could not, as we view it, bring his status within the jurisdiction of our district court. Domicile in legal contemplation depends, not alone upon residence, but upon all the circumstances surrounding the act of residence. (9 R. C. L. 540.)

The establishment of residence, like that of domicile, must depend largely upon the intention of the party, and no intention can be even assumed where in a matter of this kind the party seeking to confer jurisdiction on the courts for the purpose of having the latter determine his marital status declines to even assert his residence.

The rule recognizing the right of the wife to acquire another and separate domicile from her husband where

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their unity is dissolved will not avail in behalf of the husband to the extent that he may go into a jurisdiction foreign to the matrimonial domicile, and, without asserting his residence or domicile therein, invest the courts with jurisdiction to determine his marriage status. (*Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.)

The right of the wife to establish a separate residence and domicile from that of the husband arises out of the necessity of the case, and, as we view the law, her right to assert a separate residence grows out of the grounds or causes by reason of which the matrimonial unity no longer exists in fact. It is the averment of a residence separate and apart from that of the husband, together with the causes for such separate residence, that gives the wife the right to sue for divorce in the courts of a jurisdiction other than that of the matrimonial domicile.

This case is to be distinguished from the case of *Tiedemann v. Tiedemann*, *supra*, inasmuch as in that case the wife asserted in her verified complaint grounds which, if proven, were sufficient to establish a cause for her maintenance of a separate residence and domicile, and coupled with these averments was the allegation of her residence within this jurisdiction; while in this case no averment of residence on the part of the husband, the plaintiff, appears, and the marital offenses of which he complains were such as might properly have been determined by the courts of the matrimonial domicile.

We are cited to many authorities, some of which bear directly and others indirectly upon the question at bar. But in reviewing these authorities we must not lose sight of the fact that we are dealing with a matter of public concern, one in which the basic or underlying thing applicable to the conference of jurisdiction is that of the status of the parties to a marriage contract; and, while there is a lack of uniformity in the decisions, there is nevertheless a strong tendency appearing in those decisions which we deem best considered to hold that the question of domicile is vital in determining jurisdiction.

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In the case of *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. Rep. 252, the very question which we deem the turning point in the matter at bar was touched upon. In that case the parties were married in Massachusetts and lived together until the wife deserted the husband, who afterwards moved to Colorado, and there prosecuted a divorce against the wife on grounds of desertion and adultery. There the court said:

"It is sufficient for the present case to say that by our decision, it not appearing that the wife separated from her husband for justifiable cause, her domicile followed his, and that therefore, for the purpose of divorce, the court in Colorado had jurisdiction of both the parties, within the meaning of the statute."

In the case of *Keil v. Keil*, 80 Neb. 496, 114 N. W. 570, the Supreme Court of Nebraska had under consideration a question quite similar to that at bar, in which Keil, a minister, having received a call from a church in Iowa, moved with his wife and family to the latter state. After living in Iowa for some months, the wife with her children returned to the State of Nebraska, their former residence, and within three days after arriving in the latter state she brought her action for divorce, alleging that the defendant was a nonresident. It was held that, the plaintiff and defendant having established a home in Iowa with intention to make it their future residence, the plaintiff, the wife, could not regain her residence in Nebraska to entitle her to maintain an action for divorce until she had been there for a period of six months.

Many authorities may be found where, following the rule laid down by this court in the case of *Tiedemann v. Tiedemann*, *supra*, the wife, declaring her residence to be in a jurisdiction foreign to that of her husband, has successfully maintained an action for divorce even through constructive service. Indeed, many other cases have been cited to us where the husband, moving to another jurisdiction than that of the matrimonial domicile, has taken up his residence in the foreign domicile, and there successfully prosecuted his suit for dissolution of the

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marital relations. But the case at bar falls within a different class from either of these, inasmuch as the husband, the plaintiff here, fails to assert domicile or residence within this state, and the status of the parties is not by any allegation declared to be within the jurisdiction of our district court.

As we have already stated, the question of residence is one that may depend upon both the acts and the intention of the party seeking to establish the same. It is a question which involves both the law and the facts, and may be determined by the acts and conduct of the party and by other matters susceptible of proof. (*Hulett v. Hulett*, 37 Vt. 586; *Reeder v. Holcomb*, 105 Mass. 94; *Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427; *Kennedy v. Ryall*, 67 N. Y. 379; *Hope v. Flentge*, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806; 9 R. C. L. 556.)

In applying the statute of this state relative to jurisdiction in divorce proceedings, as in applying the statutes of any state, the matrimonial domicile of one or the other of the parties to the action, it must be borne in mind, is essential to confer jurisdiction over the status of the marital relation. The complaint must allege that one or the other of the parties has a domicile within the jurisdiction of the court in addition to alleging any other facts necessary to comply with statutory requirements such as residence or presence within the county where the suit is instituted. Statutes regulating divorce are presumed to be enacted with reference to the general law relative to the marriage relation and are to be construed with reference to that law. Marital status follows marital domicile and is independent of the corporeal presence of either or both of the parties. It is for this reason that the courts of one state are without power to annul a marital status which exists in another state. Where neither party to the suit has a domicile within the state where the action is instituted, the courts of that state are without jurisdiction of the subject-matter of the action. A state may empower its courts to dissolve the marital relation where only one of the parties has a

domicile within the state, and its statutes may make it immaterial whether it be the domicile of the plaintiff or the defendant. Such, we think, is the law of Nevada.

The difficulty with the complaint in the case at bar lies in the fact that the plaintiff does not allege residence and hence no domicile in this state in himself. The allegation of residence in the defendant wife, without the allegation of facts from which it would follow that her domicile is separate from that of her husband, is insufficient. From the allegations of the complaint, the matrimonial domicile of the defendant wife must be assumed to be the same as that of the husband plaintiff, and that is not alleged to be within the jurisdiction of the court.

The intention of the party may be established by proof as any other element going to the merits of the action and as any other fact in the case may be determined by the trial court.

The order of the trial court is affirmed.

It is so ordered.

Per Curiam:

Petition for rehearing denied.

Points decided

[No. 2213]

GEORGE A. PHILLIPS, PLAINTIFF AND INTERVENER;
CHARLES O. DAHLSTROM AND LOUIE AMEDEO,
INTERVENERS AND RESPONDENTS, v. THE SNOW-
DEN PLACER COMPANY (A CORPORATION),
THOMAS WILSON AND M. E. WILSON, DEFEN-
DANTS AND APPELLANTS.

[160 Pac. 786]

1. JUSTICES OF THE PEACE—LIENS—ENFORCEMENT—JURISDICTION—
CONSTITUTIONAL AND STATUTORY PROVISIONS—"SUM INVOLVED."

Const. art. 6, sec. 8, enacted while Stats. 1861, c. 15, was in force in the territory, providing for the foreclosing of all liens in one action, requires the legislature to fix the powers of justices of the peace, and authorizes it to confer jurisdiction upon them, concurrent with the district courts, of actions to enforce mechanics' liens wherein the amount does not exceed \$300. Rev. Laws, 5714, is to the same effect, and section 2224 allows any number of lien-claimants to join in the same action and the court to consolidate separate actions; and section 2227 provides that such liens may be enforced by an action in any court of competent jurisdiction, and, as amended by Stats. 1907, c. 90, applies to mechanic's lien proceedings in justice's court where the sum involved does not exceed \$300. *Held*, that the words "sum involved" mean the sum involved in the several liens embraced in a suit, and that a justice's court had no jurisdiction of an action to foreclose mechanics' liens, where the total amount of the liens exceeds \$300, notwithstanding each of the liens is for a less amount.

2. CONSTITUTIONAL LAW—CONSTRUCTION—DEBATES.

In the construction of a constitutional provision, it is not improper to examine the debates on the subject, though they are not authoritative, as it is the text of the constitution which was adopted.

3. JUSTICES OF THE PEACE—APPEAL—JURISDICTION—JURISDICTION OF LOWER COURT.

The general rule is that the district court acquires no jurisdiction to try a cause on appeal from a justice's court, where the justice's court was without jurisdiction to entertain the case and render judgment therein.

4. JUSTICES OF THE PEACE—APPEAL—JURISDICTION—DISTRICT COURT—CONSENT.

Where the justice's court had no jurisdiction of a suit to enforce mechanics' liens wherein the aggregate amount involved exceeded \$300, but where the district court had original concurrent jurisdiction of the subject-matter, without such limitation as to amount, and where the defendant therein, after judgment for the plaintiff and the intervening claimants, appealed to the district court, where trial was had without

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any question being raised as to its jurisdiction, he was estopped to thereafter question the district court's jurisdiction on the ground that it had no greater jurisdiction on appeal than the justice's court.

5. APPEAL AND ERROR—FINDINGS—PRESUMPTION—EVIDENCE TO SUPPORT.

Where the evidence is not included in the transcript, the supreme court is bound to assume that it supports the findings.

6. MINES AND MINERALS—MECHANICS' LIENS—POSTING OF NOTICES—SUFFICIENCY—STATUTE.

Under Rev. Laws, 2221, providing that an improvement on land with the owner's knowledge shall subject the owner to a lien unless, within three days after his knowledge of the improvement, he gives notice that he will not be responsible therefor by posting a notice in writing to that effect in some conspicuous place upon the land, etc., a notice posted at the collar of a mine shaft, which the owner, when he entered into an agreement with the contractor, knew would necessarily be destroyed in preparing the shaft for mining operations, and which was so destroyed prior to the contractor's employment of the claimants, was not binding upon the claimants, as a notice must be so posted as, under ordinary conditions, it will remain a reasonable length of time, though a written notice in lead pencil would be as good as any other notice.

7. MINES AND MINERALS—MECHANICS' LIENS—PROCEEDINGS—COSTS.

In a suit to foreclose mechanics' liens for work done under a contractor for mining work, brought in a justice's court, the allowance of costs to the plaintiff and intervening claimants in that court was erroneous.

APPEAL from the Fifth Judicial District Court, Nye County; *Mark R. Averill*, Judge.

Action to foreclose a mechanic's lien by George A. Phillips against the Snowden Placer Company and others, in which Charles O. Dahlstrom and Louie Amedeo, lienholders, were permitted to intervene. Judgment in the district court in a trial *de novo* on appeal from a justice's court, in favor of the plaintiff and the interveners. Motion for new trial denied, and defendants appeal. **Modified and affirmed.** COLEMAN, J., dissenting in part.

STATEMENT OF FACTS

This case involves the foreclosure of a mechanic's lien in the sum of \$200 claimed by the plaintiff, and a similar lien for the sum of \$260 claimed by Louie Amedeo, also a similar lien for \$255 claimed by Charles O. Dahlstrom;

Statement of Facts

the liens being respectively claimed against the Black Cat mining claim, situate in Manhattan mining district, Nye County, Nevada.

The facts, as shown in the record, disclose that the appellants Wilson and Wilson were the owners of the Black Cat mining claim, and that they leased the claim to the Snowden Placer Company; that the Snowden Placer Company operated the ground by placer mining, and in the course of such operations employed the plaintiff, Phillips, and the interveners, Amedeo and Dahlstrom, to perform work upon the ground. The Snowden Placer Company having failed to pay the plaintiff and interveners the respective sums claimed by them, a lien was filed by plaintiff, and the liens of the interveners, Amedeo and Dahlstrom, were filed for record on the same day.

Subsequently suit was commenced in the justice court of Manhattan township to foreclose the lien of Phillips, in which suit the justice court made an order on November 1, 1913, that the said Amedeo and Dahlstrom be permitted to intervene, and such intervention was thereupon had. The Snowden Placer Company made no appearance. The defendants Wilson and Wilson appeared and filed their answer, alleging that they were the owners of the Black Cat mining claim; that the mining operations conducted thereon, according to their information and knowledge, were conducted by one R. T. Ashley; and that they had no knowledge of mining operations conducted on said claim by the Snowden Placer Company.

A trial was had in the justice court before a jury, and resulted in a disagreement, and thereupon the trial of the cause was set and a jury was again had, and a verdict was returned in favor of the plaintiff and against the defendants Wilson and Wilson to the extent of their interest as owners of the mining claim described in the complaint, and a judgment was entered in favor of Phillips for \$200, with interest at 7 per cent per annum from October 9, 1913, with costs of suit, and \$3 for filing lien claim, also for the sum of \$260 in favor of Amedeo, intervener, together with \$3 cost of filing lien claim, also

Argument for Appellants

for the sum of \$255 in favor of Charles O. Dahlstrom, intervener, together with \$3 cost of filing lien claim, and \$75 attorney's fee allowed by the justice court.

An appeal was thereupon taken from the justice court to the district court, and the trial was had, and the district court ordered that judgment be entered in favor of plaintiff in the sum of \$195, with \$50 attorney's fee; for the intervener Amedeo, \$250, and \$60 attorney's fee; for the intervener Dahlstrom, \$250, and \$60 attorney's fee. From the judgment, and from an order denying a motion for a new trial, an appeal has been taken to this court.

H. R. Cooke, for Appellants:

The justice court had no jurisdiction, the aggregate of the three liens being in excess of the amount over which the said court has jurisdiction; consequently, the district court had no jurisdiction on the appeal. The district court can take no jurisdiction on appeal of a case of which the justice court had no jurisdiction. (Const. Nev., sec. 8, art. 6; Rev. Laws, 5714; *Fitchett v. Henley*, 31 Nev. 326.)

The law does not require the maintaining of the non-liability notice during the entire time that the work is being carried on, or for any period whatsoever. All that is required is that the owner "give notice that he will not be responsible for the same, by posting a notice in writing to that effect." (Rev. Laws, 2221; *Marshall v. Cardinell*, 80 Pac. 652.)

No strict construction should be indulged in against the owner of the property. If the nonliability notice was posted within three days after construction is actually commenced on leased land, it is sufficient, though the owner had knowledge for a longer period of the intention to construct. (*Birch v. Magic Transit Co.*, 73 Pac. 238.)

If a party fail to file a cost bill within the time prescribed, he waives his right to costs. (*Linville v. Scheeline*, 30 Nev. 106.) The cost bill in the district court was not filed in time, and therefore had no efficacy whatsoever. (Rev. Laws, 5387; *Beco v. Tonopah Ex. M. Co.*, 37 Nev.

Argument for Respondents

199.) Costs should follow the judgment; the justice court judgment is dead, and therefore cannot be followed by costs. The only judgment that costs can follow is the one in the district court, and then only by being claimed in the manner and within the time provided by law.

H. H. Atkinson, for Respondents:

It is not the "amount of the liens sought to be enforced" that confers jurisdiction on the court, but "the amount of the lien sought to be enforced." As long as the lien claim sought to be enforced is less than \$300, the justice court would have jurisdiction and power to consider it, whether the lien claim be made the object of an individual suit, or whether the owner of this lien claim appears as one of many claimants or plaintiffs, all having claims less than \$300, and bringing them in one action against the defendant, claiming judgment severally against the defendant. It is not the amount that is involved in an action which determines the jurisdiction of the court, but it is the amount for which judgment is prayed by the person in his pleading. (*Klein v. Allenbach*, 6 Nev. 159; *Thomas v. Anderson*, 28 Cal. 99; *Derby v. Stevens*, 30 Pac. 820; *Succession of Justus*, 16 South. 840; *Miller v. Carlisle*, 59 Pac. 785; *Briggs v. Hall*, 141 Pac. 1067.)

When the constitution and the statutes conferred upon the justice court jurisdiction concurrent with the district court of actions for the enforcement of mechanics' liens, where the amount of the lien sought to be enforced, exclusive of interest, does not exceed \$300, it conferred upon the justice court the jurisdiction to enforce a mechanic's lien in the same manner as it could be enforced in the district court, the only limitation upon those powers conferred being the one which prohibited the justice court from considering a lien where the demand amounted to more than \$300. Confusion would result from such a lack of power. Where there were several lien claimants holding liens for sums less than \$300, respectively, it would be impossible for the court in any separate action

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to determine the rank of the lien. (*Willamette S. M. L. & M. Co. v. Los Angeles C. Co.*, 94 Cal. 229, 29 Pac. 625.)

The justice court, as the court of original jurisdiction, and the district court, in its appellate capacity, had power and jurisdiction to hear and determine the claims of plaintiff and interveners and to render judgment thereon.

The notice of nonliability must be posted within three days after the date the owners know of the intended construction or of the actual commencement of the work. A mere perfunctory posting is not sufficient. It must be of such a nature as is intended to give notice, and the posting must be in good faith. When evidence is not in the record, the appellate court will not consider the question whether the verdict is contrary to law, or whether it is contrary to the evidence. (*Oberlin v. Kronenberger*, 50 Ind. 365.) "A finding of fact by the trial court is conclusive on appeal when the evidence is not in the record." (*Stewart v. Hollingsworth*, 129 Cal. 177, 61 Pac. 936; *Miller & Lux v. Enterprise C. & L. Co.*, 145 Cal. 652, 79 Pac. 439; *Mound City L. & S. Co. v. Miller*, 70 L. R. A. 190; *Whitehouse v. Aiken*, 190 Mass. 468, 77 N. E. 499; *Sayer v. Brown*, 119 Ga. 539, 46 S. E. 649; *King v. King*, 215 Ill. 100, 74 N. E. 89; *Place v. Conklin*, 54 N. Y. S. 532.)

The plaintiff need not allege in his complaint that the notice was not given by the owner of the ground; that is a matter of defense to be set up by the defendant, and must be proven by the defendant by a preponderance of evidence. (*West Coast L. Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231.)

Where the lessor had knowledge of lessees' intention to make improvements, and where no notice disclaiming responsibility was posted, the lessor is charged with knowledge sufficient to put him upon inquiry as to the particular facts relating to the improvement. (*Evans v. Judson*, 120 Cal. 282, 52 Pac. 585; *Moore v. Jackson*, 49 Cal. 109; *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 51 Pac. 555.)

The costs of the justice court, after being determined,

became a part of the judgment. If the judgment is appealed from on question of law and fact, the costs are a part to be considered on the appeal. They will be taken up by the district court in the consideration of the case, and the court will make its findings and render judgment thereon before the cost bill in the district court is filed. (Rev. Laws, 5387, 5778.)

By the Court, NORCROSS, C. J. :

After two trials in the justice court and a trial *de novo* in the district court on appeal from the judgment of the justice's court, the question of the jurisdiction of the justice's court to try the case originally, and of the district court to try the case as on appeal, is raised for the first time on appeal to this court. The question, however, is one of great importance, not only to the parties to the present action, but because it goes to a matter of procedure based on the organic law of the state.

1. Section 8 of article 6 of the state constitution, in part, reads:

"The legislature shall determine the number of justices of the peace to be elected in each city and township of the state, and shall fix by law, their powers, duties and responsibilities; *provided*, that such justices' courts shall not have jurisdiction of the following cases, viz.: * * * Of cases that in any manner shall conflict with the jurisdiction of the several courts of record in this state; *and provided further*, * * * the legislature may confer upon said courts, jurisdiction concurrent with the district courts, of actions to enforce mechanics' liens, wherein the amount (exclusive of interest) does not exceed three hundred dollars. * * *"

By the statute it is provided that the justices' courts shall have—

"concurrent jurisdiction with the district courts of actions for the enforcement of mechanics' liens, where the amount of the lien sought to be enforced, exclusive of interest, does not exceed three hundred dollars." (Rev. Laws, 5714, subd. 11.)

There is some slight difference in the wording of the constitution and the wording of the statute cited *supra*; but, as the legislature cannot by statute confer a broader jurisdiction upon justices' courts than that authorized by the constitution, we need only consider the language of the constitution.

It is the contention of counsel for appellant that the language of the constitution, cited *supra*, does not contemplate the conferring of jurisdiction upon justices' courts of an action to foreclose two or more mechanics' liens where the aggregate amount of the liens exceeds \$300, notwithstanding each of the several liens sought to be foreclosed in an action is for an amount less than \$300. We agree with this contention of counsel. Our attention has not been called to a similar provision appearing in the constitution of any other state which has been construed. At the time this provision was under consideration by the constitutional convention, it was contended by Mr. Brosnan (afterwards a justice of this court) that none of the state constitutions distinctly defined the jurisdiction of justices of the peace, but that such jurisdiction was a matter which the legislature was empowered to fix, citing "American Constitutions." (Nevada Constitutional Debates, p. 691.)

Examining the history of this provision of our constitution, we find that the original proposed draft of the section recommended by the committee did not contain such provision. In this connection we find the following resolution offered by Mr. Banks:

"*Resolved*, That article 6 be referred to the judiciary committee, with instructions to amend the same so as to give to justices of the peace jurisdiction in all cases of forcible entry and unlawful detainer, and mechanics' liens, where the amount involved does not exceed three hundred dollars." (Nev. Const. Debates, p. 688.)

Discussing this proposed amendment, Mr. De Long is reported (page 688) as saying:

"Suppose we confer jurisdiction, as he proposes, to the extent of \$300, in cases of mechanics' liens. There may

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be one mechanic who claims a lien of only \$300, and he brings his suit before a justice of the peace. But the law requires that all other parties holding liens on that property, when he commences to foreclose, shall come forward and present their claims, and it is a principle of equity that the first claimant shall be estopped from proceeding until all the other claims are united with his. Consequently, there are several men having liens, to the amount of \$10,000, perhaps, on the same building. They cannot present that case in a justice's court, because the court cannot render a judgment for such an amount; and what are you going to do? It is evident that you cannot settle it by one suit, and consequently you must permit a multiplicity of suits. Suppose we engraft in the article the provision which the gentleman suggests, what is to be done in a case where there is one lien of \$10,000 and another of \$300? Both liens must be paid, and the proper way is to have them all come in together, that the chancellor may make his decree in such manner that full and fair equity may be done to all; but under this provision the \$300 man would be obliged to go off and commence suit on his own hook. It would certainly increase the difficulties in the way of obtaining justice for the poor man."

To these remarks Mr. Banks is reported (page 689) as replying as follows:

"I wish to reply to that portion of the speech of the gentleman from Storey (Mr. De Long), in which he refers to mechanics' liens, and what would be the course of proceeding in such a case as the one to which he has referred. Now suppose, for instance, that this amendment be adopted, and one man brings his suit under the mechanic's lien law, claiming that he is entitled to receive some amount less than \$300; then others come in with their claims, amounting in the aggregate to a sum which exceeds \$300. At the very worst, all that is then required is to transfer the case to a court of competent jurisdiction. Such has been the practice in California, and no doubt it will be in this state, if we shall adopt this proposition."

The form of the provision as finally adopted was drafted by Judge Brosnan. (Debates, pp. 700-702.) Relative to the final draft, the following colloquy is reported (page 702) as occurring between Delegates Banks and Brosnan:

"Mr. Banks—Then I understand from the gentleman from Storey that, in case of the foreclosing of mechanics' liens, suit may be brought, within the amount of \$300, in a justice's court. That is, it may be brought either in a justice's court, or the district court, provided the amount involved is less than \$300.

"Mr. Brosnan—The mechanic having a lien to that amount has his choice of courts."

2. Relative to the consideration to be given expressions made in debate by delegates to the constitutional conventions, this court in *State ex rel. Lewis v. Doron*, 5 Nev. 409, said:

"It is not improper in this connection to examine the debates upon the subject, though of course they are not authoritative, nor is any binding effect to be given them, as it is the text of the constitution which the people adopted."

See, also, *Moore v. Orr*, 30 Nev. 470, 98 Pac. 398.

It is the "amount" which cannot exceed \$300 according to the language of the section. What amount? The amount of one particular lien, or the amount of several liens which the action may be instituted to foreclose? The law in force in the territory of Nevada at the time of the adoption of our constitution, as the law of the state now provides, made provision for the foreclosing of all liens in one action. (Stats. 1861, p. 37.) Referring to the lien law of California, the supreme court of that state in *Mars v. McKay*, 14 Cal. 128 (decided in 1859), said:

"The idea of a multiplicity of suits in cases like the present is expressly excluded. The statute requires that every lien on the same property shall be litigated and enforced in the same action, and every suit brought to enforce a particular lien must be regarded as a proceeding to enforce all the liens against the same property."

The lien law adopted in 1875, now in force in this state,

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contemplates the foreclosure of all liens in one action. It is provided in section 12 (Rev. Laws, 2224):

"Any number of persons claiming liens may join in the same action; and when separate actions are commenced the court may consolidate them."

By section 15 (Rev. Laws, 2227) it is also provided:

"Said liens may be enforced by an action in any court of competent jurisdiction," etc.

The provisions of this section clearly contemplate the foreclosure of all liens in one action and one judgment. By an amendment (Stats. 1907, p. 192) the provisions of this section—

"as to action on, trial of, and sale of premises under mechanics' liens, shall be applicable to such actions in a justice court, where the sum involved does not exceed three hundred dollars."

What did the legislature mean by the words "sum involved" as used in this amendment? We think the words here used are susceptible to no other meaning than the sum involved in the several liens embraced in the suit. This, we think, may be taken as a construction by the legislature of the provisions of the constitution, and is entitled to consideration as a construction by a coordinate branch of government. In the recent case of *Daly v. Lahontan Mines Co.*, 39 Nev. 14, we said:

"Trial courts, in actions to foreclose one or more liens, where it appears that there are other lien claimants, and especially where it appears that other suits are pending for the foreclosure of all or a portion of such other liens, should endeavor within all reasonable limitations to protect the rights of all lien claimants in one judgment."

In *Elliott v. Ivers*, 6 Nev. 290, this court said:

"The statute undoubtedly contemplates a formal suit, a publication of notice, an appearance upon the part of lien claimants other than those commencing the suit, and a disposition of the entire matter of liens against the property affected, in one proceeding."

See, also, *Lonkey v. Wells*, 16 Nev. 271, 277; *Skyrme v. Occidental M. Co.*, 8 Nev. 231.

We think the provision of the constitution in question ought to be so construed as not to confer jurisdiction upon justices' courts to foreclose mechanics' liens, where the total amount of all the liens involved in the suit exceeds \$300. We think the wording of the section is more in harmony with this construction than the one to sustain a more extensive jurisdiction. The construction is in harmony with what seems to have been the intent of the framers of the constitution, and better accords with the provisions of the statute as it existed both before and since the adoption of the constitution. If any other construction were given to this provision of the constitution, we would have this anomalous situation. Several liens might be filed upon a certain property, some of which were for amounts less than \$300, and some of which were for amounts exceeding \$300. If suit were instituted in the justice's court upon one or all of the liens less than \$300, those in excess of \$300 could not be exhibited and foreclosed in that action. Another suit would have to be instituted in the district court upon these latter liens. The statute could not be complied with in either case, unless the suit in the justice's court was abandoned or dismissed and the liens involved in that suit exhibited in the district court. As all lien claims must be recorded within a prescribed time, it is an easy matter for a litigant to determine whether the total amount of the liens will be in excess of the jurisdiction of the justice's court.

3, 4. It is contended by counsel for appellant that the judgment rendered by the district court is void, because the district court had no greater jurisdiction on appeal than did the justice's court in the trial originally. This court in a number of cases has held that the district court acquired no jurisdiction to try a cause on appeal from a justice's court, where the justice's court was without jurisdiction to entertain the case and render judgment therein. (*Fitchett v. Henley*, 31 Nev. 341, 102 Pac. 865, 104 Pac. 1060, and authorities therein cited.) It must be conceded that this is the general rule, which is supported

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by many authorities. (24 Cyc. 641.) The rule in many instances has been harshly applied. It is a rule, however, not without exceptions.

"While it has been held that, where the justice of the peace had no jurisdiction of the subject-matter of an action, the parties cannot confer jurisdiction on the appellate court by consent, the better view seems to be that, where the appellate court has original as well as appellate jurisdiction of the cause, jurisdiction of both the subject-matter and the person may be conferred upon it by waiver or consent." (24 Cyc. 643.)

In *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 456, 142 N. W. 44, 46, the court said:

"But we can see no distinction in principle between this case and that of *Johnson v. Erickson*, *supra*. There, in a justice court proceeding, title to real property was brought in issue, whereupon, under the statute, it became the duty of the justice to forthwith certify the cause to the district court, but instead of so doing he dismissed it. Upon appeal it was urged, the same as here, that the district court was without jurisdiction because of the rule 'that the district court by virtue of an appeal succeeds only to the jurisdiction of the justice court, and that where the justice court has no jurisdiction the appellate court acquires none.' The court there says: 'In this case the justice not only had authority to transfer the case to the district court, but it was his express duty to do so. The distinction between this case, and those where there is no jurisdiction or no authority to transmit, is apparent. In such cases there is neither right nor duty to certify the case, and of course an appeal would not give jurisdiction. * * * The proceedings are irregular, but were made so by the error of the justice in rendering a judgment of dismissal, instead of certifying the case; and for this error the plaintiff is in no way responsible. * * * We are of opinion that when a justice has, by disregarding the statute, made it necessary to appeal, the district court acquires jurisdiction,

and that it is error for the district court to refuse to entertain the action and to dismiss the appeal; and this view is in harmony with the opinion of other courts under similar statutes.' There the justice pronounced an unauthorized judgment when, instead, he should have certified the case to the district court for further proceedings; yet the appeal from such unauthorized judgment was held to vest jurisdiction of the subject-matter in the appellate court, which ordinarily would have been transferred there without appeal by order of the justice. Here the justice court, having conceded jurisdiction of person and subject-matter, proceeds unauthorizedly, after it had become its mandatory duty to transfer the cause for trial to another justice court, and accordingly enters judgment, void because of want of power to enter any judgment at all, but from which defendant has seen fit to appeal generally upon both law and fact and demand a trial *de novo* in the appellate court. The statutes concerned in *Johnson v. Erickson*, and in the case at bar, are in effect analogous, both superseding jurisdiction to determine the merits. If an appeal from a void judgment of dismissal, as in *Johnson v. Erickson*, confers appellate jurisdiction of subject-matter, most certainly under these circumstances the appeal so taken generally must be held to confer jurisdiction of subject-matter as well as person upon the appellate court."

See *Johnson v. Erickson*, 14 N. D. 414, 105 N. W. 1104; *Heard v. Holbrook*, 21 N. D. 348, 131 N. W. 251.

In the case at bar, the justice's court had jurisdiction of the action as brought upon the Phillips complaint. It was also an action of which the district court had concurrent jurisdiction. It was not until Dahlstrom and Amedeo intervened to enforce their liens that it appeared that the justice's court was without jurisdiction to proceed to trial and judgment. When Dahlstrom and Amedeo intervened, it was, we think, the duty of the justice to certify the case to the district court. The situation was then analogous to that of a case where title to real property is

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raised by answer or by evidence upon the trial. The jurisdiction to proceed to trial was not raised by defendant. After trial and judgment in favor of the plaintiff and intervening lien claimants, defendant took his appeal to the district court, where trial was again had without any question being raised as to the jurisdiction of either court. The question of jurisdiction was apparently not thought of until after appeal to this court.

It may be conceded that the judgment of the justice's court was a nullity, and no appeal, in the strict sense of the law, would lie therefrom. But the appeal had the effect of causing the case to be certified to the district court. Both parties proceeded to try the case upon the merits without questioning the jurisdiction. The subject-matter of the action was such that the district court had original jurisdiction to try. The parties submitted themselves without question to the jurisdiction of the court. This is not a case of an attempt to confer by consent jurisdiction of a subject-matter beyond the court's jurisdiction. Rather it should be regarded as a waiver of any technical objection which might have been raised as to the manner of acquiring jurisdiction. Where parties, without objection, proceed to the trial of a case, the subject-matter of which is within the original jurisdiction of the court, the rule of estoppel ought to apply against a subsequent questioning of jurisdiction. The modern tendency of courts is to break away from technical rules of practice. The sooner many rules, around which are encircled the halo of time-honored recognition, are modified, restricted, or entirely discarded, the sooner will courts perform the real function for which they were created, the adjudication of controversies between litigants upon their real merits. When that time arrives, and it is fast approaching, the occasion for dissertations by eminent lawyers, jurists, and laymen upon the "sporting theory of justice" will have ceased.

5, 6. Defendants interposed the defense of nonliability, based upon the posting of certain notices upon the premises. The statute provides:

"Every building or other improvement * * * constructed upon any lands with the knowledge of the owner * * * shall be held to have been constructed at the instance of such owner * * * and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner * * * shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situate thereon." (Rev. Laws, 2221.)

Relative to the matter of notices, the court made the following findings:

"That on or about the 1st day of March, 1913, when said agreement of March 1, 1913, between the defendants Wilson and Snowden Placer Company was entered into, there was already posted from previous operations a notice that the defendants Wilson of the Black Cat mining claim would not be responsible for debts incurred or labor or materials furnished for any operation upon said Black Cat mining claim, but that said notice was in a damaged condition from exposure to the elements; that said notice was posted at the collar of a shaft which the defendants Wilson knew would be used by the Snowden Placer Company for operations, as soon as it commenced to work under the agreement of March 1, 1913, upon the Black Cat mining claim, and through which said shaft the said Snowden Placer Company would conduct all of its mining operations; that the said defendants Wilson knew that the notice thus posted upon a board, nailed at the inside of the collar of the shaft, would necessarily be destroyed in preparing said shaft for mining operations; that the said notice posted at said shaft was therefore not posted in good faith, by the defendants Wilson, so as to give notice to workmen employed by Snowden Placer Company in its operations upon said Black Cat mining claim; that said notice was destroyed on or before

March 10, 1913, while said shaft was being prepared for mining operations by employees of said Snowden Placer Company.

"That the said Thomas Wilson, on March 1, 1913, posted a notice on the transformer house of said Black Cat mining claim of the same purport to that which was posted at the shaft heretofore mentioned, and wrote the same in lead pencil upon paper which had long been exposed to the elements, and which defendant Thomas Wilson knew would not remain legible and intelligible for as long a time as under ordinary conditions an ordinary notice would be expected to remain, and that said notice was not posted in good faith to give notice for a reasonable length of time to workmen who would work upon said premises for the defendant, Snowden Placer Company; that said notice was illegible and unintelligible when plaintiff and interveners commenced their work upon the said Black Cat mining claim for Snowden Placer Company, defendant herein, and remained illegible and unintelligible to and including August 20, 1913, and was not posted in a conspicuous place on said claim, when said employment ceased; that said Thomas Wilson, on or about May 15, 1913, posted a notice on the engine house of said Black Cat mining claim of the same purport to that which was posted at the shaft heretofore mentioned, and wrote the same in lead pencil upon a piece of cardboard which the defendant Thomas Wilson knew would not remain legible and intelligible for as long a time as an ordinary notice would be expected to remain so, and therefore said notice was not posted in good faith to give notice for a reasonable length of time to workmen who were or would be working upon said Black Cat mining claim for the defendant Snowden Placer Company; that said notice was illegible and unintelligible at the time that the plaintiff and interveners commenced working upon the said Black Cat mining claim for the defendant Snowden Placer Company, and remained illegible and unintelligible up to and including the 20th day of August, 1913."

But one case is cited by respective counsel as an aid to the court in determining the question of the sufficiency of the notices posted as found by the court, to wit, the case of *Marshall v. Cardinell*, 46 Or. 410, 80 Pac. 652. From the opinion in that case we quote:

"The statutory manner of giving notice is by posting a written announcement, presuming, no doubt, that when once posted it will remain a sufficient length of time to impart knowledge to the persons it is intended to affect. The language is not to keep it posted, but to give notice by posting, and when once posted it will fulfil the mandate of the statute. Of course, if the notice were torn down immediately, or very soon after, by the one who posted it, there would be an apparent attempt to evade the statutory injunction, and the act would probably not be accounted as giving notice by posting; but if posted in good faith, with the intent and purpose that it should remain as long as a notice would remain in a place of that nature under ordinary conditions, it would seem that the intentment of the statute had been observed and the notice given."

The evidence is not included in the transcript, in which case we are bound to assume that the evidence supports the findings. It is found, however, that three notices were posted, and it is a question whether the court made proper legal deductions from the findings relative to these notices.

The first notice considered was posted at the collar of the shaft. It appears from the findings that this was a notice posted prior to the agreement entered into with the Snowden Placer Company. This notice, primarily intended for "previous operations," was "in a damaged condition from exposure to the elements." To what extent it was damaged does not appear, but in view of other portions of the findings this fact is immaterial. It is found that at the time appellants entered into the agreement with the placer company they knew this notice "would necessarily be destroyed in preparing said shaft for mining operations"; that said notice was so destroyed prior

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to respondents being employed by the placer company. The statute says a notice shall be posted "after" knowledge of the construction or intended construction, etc. Assuming, however, without deciding, that a prior notice would meet the requirements of the statute, we are clearly of the opinion that persons employed after the destruction of such notice ought not to be bound thereby, where it appears that the work contemplated necessitated a destruction of such notice.

The second notice discussed in the findings was posted March 1, 1913, the day the agreement was entered into between appellants and the placer company. This notice was written "in lead pencil upon paper which had long been exposed to the elements, and which Thomas Wilson knew would not remain legible and intelligible for as long a time as under ordinary conditions an ordinary notice would be expected to remain." This notice was found to have been "posted on the transformer house of said Black Cat mining claim." It was further found that it "was not posted in a conspicuous place on said claim." A notice posted on a transformer house might or might not be said to be posted in a conspicuous place. Ordinarily it would, we think, be very apt to comply with the requirements of the statute. The evidence is not before us, and we are bound to accept the finding that it was not in a conspicuous place.

Much has been said in the briefs of counsel for the appellant that the court, in effect, held that a notice must not only be posted but must be maintained. We do not so understand such to have been the position of the court below. A notice must be so posted as under ordinary conditions it will remain a reasonable length of time; otherwise there would be no object in posting a notice at all. A notice written in lead pencil would be as good as any other notice, but whether a notice so written and exposed to the elements would remain a reasonable length of time is a question of fact for the court below to determine from the evidence, and which this court could not disturb without reviewing the evidence.

The third notice considered was posted on the engine house May 15, 1913, two and a half months after the agreement with the placer company was entered into. It is not found that this notice was not posted in a conspicuous place. This notice was not posted within the time prescribed by the statute, nor has counsel cited any authorities holding that such a subsequent notice would be binding. Upon that question we express no opinion, further than to say that we are inclined to the view that such a notice would be a valid notice, but would have no retroactive effect. The court found this notice, also, to have been "illegible and unintelligible at the time that the plaintiff and interveners commenced working." It is further found that the defendant Wilson knew when he posted this notice that "it would not remain legible and intelligible for as long a time as an ordinary notice would be expected to remain so."

As before stated, the evidence is not before us, and none of these findings are attacked upon the ground that they are not supported by the evidence. So far as this court knows, the defendants may have admitted the very facts found. It must be conceded that the findings present questions of law to this court in a very unsatisfactory way. The law only says that a notice shall be posted. It says nothing about maintaining such a notice.

It will not do, however, to say that the mere posting of any sort of a notice in a conspicuous place complies with the statute. A notice might be posted, so written that it would not remain intelligible for a day. Such a notice manifestly could not be held to comply with the law. The purpose of the statute is to give actual notice. The law only exacts a reasonable compliance with the statute, but what is a reasonable compliance must depend upon the facts of each particular case. A notice written in lead pencil on a piece of cardboard, or upon a piece of paper which had been exposed to the elements, might in every respect comply with the statute. If, however, it was so posted that any person of ordinary common sense would know that it would in a few days be effaced from

Coleman, J., concurring

exposure to the elements, a court would be justified in holding such a posting not to be a compliance with the statute.

We cannot say as a matter of law in this case that the judgment is contrary to the findings.

7. The objection to the allowance of costs in the justice's court is well taken.

The judgment will be modified by striking therefrom the costs in the justice's court, and, as so modified, it is affirmed.

McCARRAN, J.: I concur.

COLEMAN, J., concurring:

I concur in the opinion and order of the court, except as herein indicated.

There is no question but that the justice of the peace had jurisdiction of the subject-matter and of the parties in the original suit brought by the plaintiff, Phillips. Pursuant to the constitutional provision quoted in the opinion of the court, the legislature, in 1913, conferred upon justices of the peace concurrent jurisdiction with the district courts in actions for the enforcement of mechanics' liens where the amount of the lien sought to be enforced, exclusive of interest, does not exceed \$300. (Stats. 1913, c. 235, p. 360.) There is no doubt in my mind but that the judgment in favor of Phillips and against the defendants is valid, for the reason that, jurisdiction having been acquired by the justice of the peace, it was not lost by his making an order which he had no power to make. Certainly the making of an order which was void could not operate so as to oust the court of a case of which it had jurisdiction.

In the opinion of the court the remarks of Mr. Banks, a member of the constitutional convention, are quoted, wherein he stated that in cases which had arisen in California (similar to the one at bar) the practice was to transfer them to a court of competent jurisdiction. I am unable to find that justices of the peace of California

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had jurisdiction to foreclose mechanics' liens on real estate prior to the date of the holding of our constitutional convention in 1864. The jurisdiction of justices of the peace in California was fixed by an act entitled "An act concerning the courts of justice of this state, and judicial officers," passed May 19, 1853. (Comp. Laws Cal. 1850-53, p. 738.) Section 67 of the act mentioned enumerates the subjects over which justices of the peace should have jurisdiction, but the foreclosure of mechanics' liens is not one of them. Section 68 reads:

"The jurisdiction conferred by the last section shall not extend, however—1st. To * * * 2d. Nor to an action for the foreclosure of a mortgage or the enforcement of a lien on real property. * * *

It is therefore obvious that there never could have been such a practice in California. Mr. Banks probably had in mind a provision contained in section 581 of an act of California entitled "An act to regulate proceedings in civil cases, in the courts of justice of this state," passed April 29, 1851 (Comp. Laws Cal. 1850-53, pp. 623, 624), wherein it is provided that in actions in the justice of the peace court, if it shall appear that the title of real estate is involved, the proceedings shall be suspended and the case certified to the district court. We have such a provision in Nevada (Rev. Laws, 5721), but I do not think any one would contend that authority is given under that act to certify up a mechanic's lien suit. It is an elementary rule that courts of justices of the peace are of special and limited jurisdiction and that they must look to the statute for their authority to act. Since there is no statutory provision empowering justices of the peace to certify to the district court such cases as the one at bar, I am of the opinion that any such order would be void. (*Paul v. Armstrong*, 1 Nev. 82; *Corthell v. Mead*, 19 Colo. 391, 35 Pac. 741; *Storey v. Mueller*, 21 Cal. App. 301, 131 Pac. 764; 18 Am. & Eng. Ency. Law, 2d ed. p. 17.)

Notwithstanding the fact that the Dahlstrom and Amedeo judgments were void, the entire case was appealed to the district court. All of the matters which

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were considered and acted upon by the justice of the peace were within the original jurisdiction of the district court. If the Phillips suit had been commenced in the district court, instead of in the justice court, there is no question but that Dahlstrom and Amedeo could have intervened, and a valid judgment have been rendered in favor of all of the parties. If Dahlstrom and Amedeo had not undertaken to intervene in the justice court, and judgment had been entered in that court for Phillips, and an appeal had been taken by the defendants, we see no reason why Dahlstrom and Amedeo could not have intervened in the district court. In fact, as I view the situation, that, in legal effect, is what must be held to have occurred; for the matter stood, when it reached the district court on appeal, as though there had been no intervention, as the justice of the peace had no power to authorize such procedure.

Hence I am of the opinion that, since appellants went to trial in the district court upon the theory that Dahlstrom and Amedeo were in fact interveners, it is too late for them to urge their objection in this court for the first time. (*McKenty v. Gladwin*, 10 Cal. 227; *Smith v. Penny*, 44 Cal. 161; *People v. Reis*, 76 Cal. 269, 18 Pac. 309; *Sanxey v. Iowa City Glass Co.*, 63 Iowa, 707, 17 N. W. 429.)

Holding the views expressed, I am of the opinion that the plaintiff, Phillips, should recover judgment for costs in both the justice and the district courts.

Points decided

[No. 2228]

**ALPHONSE BERNARD, APPELLANT, v. METROPOLIS
LAND COMPANY (A CORPORATION), RESPONDENT.**

[100 Pac. 811]

**1. PLEADING—FAILURE TO DENY AFFIRMATIVE ANSWER—ADMISSION
—STATUTE.**

Under Stats. 1915, c. 158, providing that each material allegation of new matter in the answer, uncontroverted by the reply, must be taken as true, an allegation of the answer, undenied by the replication, must be taken as true.

**2. WATERS AND WATERCOURSES—FAILURE TO ESTABLISH ALLEGATIONS
OF COMPLAINT.**

In an action to determine water rights, where defendant's answer set up at least one allegation, which, uncontroverted and to be taken as true, established priority of appropriation in favor of defendant, plaintiff failing to establish the allegations of his complaint, the court properly dismissed the action on defendant's motion.

3. PLEADING—DEMURRER.

A demurrer may be made to a whole pleading, or to the statement of any of the grounds embodied therein.

**4. PLEADING—DEMURRER—DEMURRER TO WHOLE PLEADING PARTIALLY
GOOD.**

Where a demurrer is filed to the whole pleading, it may be overruled if any of the statements are held to be good in furtherance of the purpose of the pleading, whether establishing a cause of action or interposing a defense; the rule applying not only as to a complaint, but equally to an answer and its affirmative allegations.

**5. PLEADING—DEMURRER TO ENTIRE PLEA OR ANSWER—GOOD SEPA-
RABLE PART.**

A demurrer directed to an entire plea or entire answer, which plea or answer contains several separable parts, must be overruled if any one of the parts is in itself good.

6. JUDGMENT—PLEADING—RES ADJUDICATA.

In an action to restrain the diversion of water, allegations of defendant's affirmative answer setting forth the court, the jurisdiction, the subject-matter, and the scope and effect of a former action, plaintiff's connection with the subject-matter, the final judgment bearing upon and having to do with that matter, the common and general interest of plaintiff in that subject-matter, and his connection with the force and effect of the former judgment, was sufficient to constitute a proper pleading of former judgment affecting the parties.

7. JUDGMENT—RES ADJUDICATA.

Where plaintiff was a party to a former action, and the matter adjudicated therein was the same as that sought to be presently adjudicated, plaintiff is bound by the judgment in the former action, and cannot seek relief, against the successors to the beneficiaries of the former judgment, inconsistent with it.

Argument for Appellant

8. JUDGMENT—JUDGMENT AS BAR—QUESTION OF FACT.

The truth of a sufficiently alleged plea of former judgment affecting the same parties and the same subject-matter as involved in the present case was for the trial court, if the plea was denied.

APPEAL from Sixth Judicial District Court, Humboldt County; *Edward A. Ducker*, Judge.

Action by Alphonse Bernard against the Metropolis Land Company, a Corporation. From an order overruling his demurrer to an affirmative answer, and from a judgment entered on the pleadings, plaintiff appeals. **Order and judgment affirmed.**

A. L. Langwith, for Appellant:

The decision of the lower court should be reversed because it was error to overrule the demurrer of the appellant to that part of defendant's answer wherein new matter was alleged as affirmative and separate defenses, and especially in overruling the demurrer to defendant's second affirmative and separate defense; also, because it was error for the lower court to render and enter the final judgment and decree dismissing plaintiff's complaint and entering judgment for defendant, as appellant could in no matter be bound by the judgment in the case of *Union Canal Ditch Co. v. Pacific Reclamation Co.*, as he was not a party to that action, and the affirmative matter set up in defendant's second affirmative and separate defense could not be a defense and did not state facts sufficient to constitute a defense to appellant's complaint, and appellant's demurrer to the answer on that ground should have been sustained.

In the case of *Union Canal Ditch Co. v. Pacific Reclamation Co.* appellant herein was neither a plaintiff nor a defendant. In order to make appellant a party to said action, or to bind him by any judgment entered therein, he should have been brought in and made a party, pursuant to section 45, chapter 140, Statutes of Nevada, 1913. Section 59, Civil Practice Act (Rev. Laws, 5001), does not apply, as the rights of appellant must necessarily be adverse to the rights of many of the plaintiffs in the

Argument for Respondent

action of the Union Canal Ditch Company, or any of the other plaintiffs in the said action, as his rights may be superior to all or nearly all of the plaintiffs in that case. Not being a party to that action, he cannot be bound by the judgment; and no judgment of the court granting the Pacific Reclamation Company the water of Bishop Creek above its reservoir could bind him. (Beach on Injunctions, p. 174, and notes.)

The former action must have been between the same parties before they can be bound by the judgment. (*Ahlers v. Thomas*, 24 Nev. 407.) No rights which the state engineer might grant the Pacific Reclamation Company or its grantees or successors in interest could in any way interfere with the vested rights of appellant, and such permits can be granted subject only to those rights. (Stats. 1913, c. 140, sec. 2.)

Cheney, Downer, Price & Hawkins, for Respondent:

The final judgment or decree entered herein should be affirmed. This case comes on appeal from a final judgment entered where every material allegation in plaintiff's complaint is put in issue, and where he failed to introduce any evidence whatsoever. Every allegation in defendant's answer is admitted, in which it is shown that defendant's rights to all the waters of Bishop Creek antedate any right of plaintiff to the use of the waters of the Humboldt River; that the identical questions in issue in this action were decided in an action brought and maintained for and on behalf of plaintiff against the contentions of plaintiff; that to deprive defendant of the use of the waters would be destructive of defendant's property rights and the property rights of other interested parties; that plaintiff knew of the investment made by defendant's predecessors in interest and other parties acquiring rights therefrom; that he knew of the conditions existing, and failed to take any action in reference thereto for more than four years, unless it be held that the action of *Union Canal Ditch Company v. Pacific Reclamation Company* was for and on behalf of plaintiff;

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and if it be so held, plaintiff is barred and precluded by the final decree entered therein.

"An action may be dismissed by the court * * * upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the court or jury. * * * In every other case the judgment shall be rendered on the merits." (Rev. Laws, 5237.)

"Each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply, and each material allegation in the counterclaim not controverted by the reply, must, for the purposes of the action, be taken as true."

Plaintiff is estopped from and his right to maintain this action is barred by laches. Every element, not only of laches, but of estoppel, is present in the action, sustaining the final judgment or decree entered. (Kinney on Irrigation, 2d ed. vol. 3, sec. 1605; *Verdugo W. Co. v. Verdugo*, 93 Pac. 1021; Weil on Water Rights, 3d ed. vol. 1, sec. 644.)

By the Court, MCCARRAN, J.:

This is an appeal from an order overruling a demurrer to an affirmative answer, and from a judgment entered on the pleadings.

The record before us presents a complaint in which certain allegations essential to plaintiff's recovery were set forth. First, that he is an appropriator of water from the Humboldt River; that such appropriation was during the continuous period of thirty years; that Bishop Creek is and constitutes the headwaters of Humboldt River; that Bishop Creek and Humboldt River constitute one continuous natural watercourse; that the waters of Humboldt River as appropriated by plaintiff were essential to the successful cultivation of the lands of plaintiff and necessary for plaintiff's domestic uses; that the defendant had by artificial means diverted the waters from Bishop Creek; that this diversion was accomplished by the construction by defendant of a reservoir built

across the bed of Bishop Creek above the point on the Humboldt River where plaintiff was accustomed to divert water from the river; that defendant by means of its reservoirs, dams, and other water devices had diverted the water from the natural watercourse, and moreover had impounded by means of its reservoir all the water flowing or to flow in Bishop Creek; that defendant, by means of its reservoir, dams, ditches, canals, and other water devices in so diverting the water from Bishop Creek, had thereby prevented the water from flowing through said creek and through the Humboldt River, and had thereby prevented the water flowing through said stream system from flowing into the ditches of plaintiff, and hence had deprived plaintiff of the use of said water for the irrigation and cultivation of his lands on the Humboldt River.

The prayer of the complaint was for an injunction to prevent the defendant from so diverting the water or impounding the same, and for the establishment by judicial decree of the right of plaintiff to use the waters of Bishop Creek, and to have the same enter his ditches for the uses and purposes to which they had been applied.

The record before us presents a complaint in which certain allegations essential to plaintiff's recovery were set forth. An answer to this complaint was filed, in which, as we view it, each of the allegations of plaintiff's complaint essential to his recovery was specifically denied.

By way of affirmative and separate defense, defendant alleged:

"That for more than thirty-five years last past defendant and its predecessors have continuously during each year appropriated, diverted, used, and consumed all of the waters flowing in said Bishop Creek, and have at all of said times claimed the right so to do, and that said claim of right and said diversion, appropriation, use, and consumption for the irrigation of said lands, of all the waters of said Bishop Creek have been by said defendants and the grantors and predecessors in interest of said defendants actual, visible, open, notorious, exclusive, and

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uninterrupted for a period of more than thirty-five years prior to the institution of this action, and adverse to all the world, including plaintiff herein, during all of said time, and that any claim by the plaintiff to said or any of the waters of said Bishop Creek, as an individual stream or as a part or tributary of the Humboldt River, as against the defendant, is wrongful and without right, and constitutes a cloud upon the title of defendant herein."

As a further and second affirmative and separate defense, defendant alleged:

"That all the water flowing in said Bishop Creek has for many years past been appropriated and used for beneficial purposes by defendant and by the grantors and predecessors in interest of defendant, as hereinbefore set forth and alleged, in the irrigation of the lands hereinabove described and for watering stock and for domestic purposes, that all of said waters are necessary, and that there is no other source of supply from which water may be obtained by defendant for said purposes."

These allegations, together with other affirmative allegations, such as that pertaining to the open, notorious construction of reservoirs, diverting dams, canals, ditches, and works for storing, impounding and diverting, conveying and distributing the waters of Bishop Creek, the acquiring of lands under the Carey Act, the incurring of obligations, the laying out and construction on the lands of defendant of the town of Metropolis, the construction in said town and on said lands of expensive buildings, water-works, and lighting plant, the purchase and acquisition of other lands under the irrigation system of defendant and the settlement thereof by a number of persons, the improvement of such lands, the cultivation and irrigation of the same by the waters of Bishop Creek when the same had been stored by the reservoirs constructed, appear in respondent's answer filed by way of affirmative defense. Together with these affirmative allegations, respondent's affirmative answer sets forth the following:

"That on the 13th day of April, 1912, in the above-

entitled court, Union Canal Ditch Company, a corporation, and a number of other corporations and individuals, as plaintiffs, instituted their certain action against said Pacific Reclamation Company and others, said action in said court being numbered 1899. That the scope and purpose of said action above mentioned was the same in character as the present action, in that the plaintiffs in said action mentioned sought to enjoin and restrain said Pacific Reclamation Company from storing and impounding in said reservoir the waters flowing in said Bishop Creek, and to restrain and enjoin said Pacific Reclamation Company from diverting and using the waters of said Bishop Creek so stored and impounded, and also to enjoin said Pacific Reclamation Company from diverting by means of its canals and other devices the waters flowing in Burnt and Trout Creeks, which were alleged to be, and which are, tributaries of said Bishop Creek, the point of junction between said Burnt and Trout Creeks with said Bishop Creek being below the place or location of said reservoir and said diverting dam constructed in the bed and across the channel of said Bishop Creek. That the action, above mentioned, wherein Union Canal Ditch Company, a corporation, and others, were plaintiffs, and said Pacific Reclamation Company, a corporation, and others, were defendants, was, as alleged in said complaint, instituted for and on behalf of plaintiffs therein named and also for and on behalf of all other corporations, persons, and associations similarly situated to plaintiffs therein named and having a common and general interest in the subject-matter of the action with the plaintiffs. That plaintiff herein was, at the time of the institution of said action, above mentioned, similarly situated as the plaintiffs therein named, and had a common and general interest in the subject-matter of the action with the plaintiffs therein named. That the plaintiff herein was named in the answer filed in said action as one of the parties who should be specifically designated and brought in as a party to said action; that the institution of said action, above mentioned, and the hearing upon the order

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to show cause why injunction should not issue *pendente lite*, said hearing continuing from May 20 to June 1, 1912, and the issuance of said injunction *pendente lite*, are well known and advertised throughout the State of Nevada. That, upon information and belief, said action, so brought by Union Canal Ditch Company and others, was brought for and on behalf of plaintiff herein, and that plaintiff herein knew of the pendency of said action. That said action was pending in said court from the 13th day of April, 1912, to the 19th day of June, 1915."

It was to this affirmative answer that plaintiff demurred, the overruling of which demurrer occasioned the appeal.

The principal contention of appellant here is that in the case of *Union Canal Ditch Co. et al. v. Pacific Reclamation Co. et al.*, the appellant herein was not a party plaintiff or defendant, inasmuch as his name did not appear in connection with that suit. Appellant contends in this respect that, not being a party to that action, he cannot be bound by the judgment, and no judgment of the court granting the Pacific Reclamation Company the water of Bishop Creek could affect his right.

We are cited to the case of *Ahlers v. Thomas*, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 820, to the effect that the former action must have been between the same parties before they can be bound by the judgment. Assuming that all of appellant's contention was correct, we are at a loss to know how it can avail anything in his behalf under the record before us. First and foremost, issues as to matters essential to the success of plaintiff were, by the complaint and the specific denials in the answer, squarely joined.

Section 295 of our Civil Practice Act (section 5237, Rev. Laws 1912) provides:

"An action may be dismissed, or a judgment of nonsuit entered in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the court or jury. * * *"

In the case of *Clune v. Quitzow*, 125 Cal. 213, 57 Pac.

886, the Supreme Court of California held, under an identical code provision, that upon failure of the plaintiff to appear at the trial where defendant had filed a cross-complaint, the defendant is not bound to take a dismissal of the action, though he might do so, but has the right under the section to proceed with the case in the absence of the plaintiff and have judgment entered upon the merits finally disposing of the case.

1. As we view the record before us, the trial court might have sustained the demurrer as to respondent's affirmative matter relative to the judgment in the case of *Union Canal Ditch Co. v. Pacific Reclamation Co.* Indeed, if on motion to strike, this allegation had been stricken from respondent's affirmative answer, there was at least one other issue raised in the affirmative answer, to wit, the priority of appropriation of the respondent, which, if undenied by replication, must, under the statute (Stats. 1915, pp. 192, 193), be taken as true.

By the amendment to our Civil Practice Act (Stats. 1915, pp. 192, 193), it is provided that:

"Each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply, and each material allegation in the counterclaim not controverted by the reply, must for the purposes of the action, be taken as true. * * *"

2. As we have already stated, the issue was squarely joined by the answer of the respondent. This put the plaintiff, appellant herein, upon his proof to establish the allegations of his complaint. Failing to do this, we are referred to no rule, and are aware of none, that would preclude the court from dismissing the action on motion of the defendant. The affirmative defense, as we have said, set up at least one allegation which, if undenied, must, under the statute, be taken as true, and which, if uncontroverted and taken as true, established the priority of appropriation in favor of defendant, respondent here. This, being the pivotal point in the controversy, warranted judgment in favor of respondents.

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3, 4. A demurrer may be made to a whole pleading or to the statement of any of the grounds embodied therein. If, however, a demurrer is filed to the whole pleading, it may be overruled if any of the statements are held to be good in furtherance of the purpose of the pleading, whether it be in establishing an action in complaint or in interposition of a defense. (*Griffiths v. Henderson*, 49 Cal. 566; *Holbert v. St. Louis, K. C. & N. Ry. Co.*, 38 Iowa, 315; *Hale v. Omaha National Bank*, 49 N. Y. 626; *Bondurant v. Bladen*, 19 Ind. 160; *Carter v. Wann*, 6 Idaho, 556, 57 Pac. 314; *Knapp v. Ross*, 181 Ill. 392, 55 N. E. 127; *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135; *Palmer v. Breed*, 5 Ariz. 16, 43 Pac. 219; *Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553; *A. O. P. v. Dixon*, 45 Colo. 95, 100 Pac. 427; *Johnson v. Ry. Co.*, 243 Mo. 278, 147 S. W. 1077; *Baker v. Water Co.*, 40 Mont. 583, 107 Pac. 819, 135 Am. St. Rep. 642.)

In this respect, the rule applies not only as to a complaint, but with equal force to an answer and to the affirmative allegations therein. (*Farmers' Ins. Co. v. Menz*, 63 Ill. 116; *Johnson Co. v. White*, 78 Minn. 48, 80 N. W. 838.)

5. A demurrer which is directed to an entire plea or an entire answer, which plea or answer contains several separable parts, must be overruled if any one of the parts is in itself good. (*Eich v. Greeley*, 112 Cal. 171, 44 Pac. 483; *Holbert v. St. L. K. C. & N. Ry. Co.*, *supra*; *Van Housen v. Broehl*, 59 Neb. 48, 80 N. W. 260; *Bergstrom v. Advertiser Assn.*, 147 App. Div. 774, 131 N. Y. Supp. 1025; *Harrill v. Weer*, 26 Okl. 313, 109 Pac. 539; *Williams v. Black*, 24 S. D. 501, 124 N. W. 728.)

6. But aside from our views as here expressed, let us consider the question most relied upon by appellant, that the former judgment in the case of *Union Canal Ditch Co. v. Pacific Reclamation Co.* was not binding upon him, inasmuch as he was not a party specifically named in that action. What shall be said as to the sufficiency of the allegations in respondent's answer as to the former action, parties, and final judgment? The vital point as

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against appellant's demurrer is not the ultimate fact itself, but rather is it the allegation of the existence of a former judgment in a cause alleged to have been duly instituted and tried in a court of competent jurisdiction, involving the identical subject-matter, and the further allegation properly connecting the parties in the present action with the force and effect of that former judgment. Here the allegations as to the former judgment set forth the institution of the former action and the date thereof, the name of the principal party plaintiff, and that there were other parties plaintiff, corporations as well as individuals. It recites that the Pacific Reclamation Company (predecessor in interest to defendant here) was the party defendant. It asserts that the scope and purpose of the former action were the same in character as those of the present action in which appellant is plaintiff and proceeds to specify the scope and purpose in particular. The answer further alleges:

That the action in the former proceedings was, "as alleged in said complaint, instituted for and on behalf of all other corporations, persons, and associations similarly situated to plaintiffs therein named, and having a common and general interest in the subject-matter of the action with the plaintiffs."

Further the answer avers:

"That plaintiff in this action was, at the time of the institution of the former action, a party similarly situated as the other plaintiffs therein named, and that he had a common and general interest in the subject-matter of that action with the plaintiffs therein named."

Further it alleges:

"That the plaintiff herein was named in the answer filed in said action as one of the parties who should be specifically designated and brought in as a party to said action," and "that said action [referring to the former action] so brought by Union Canal Ditch Company and others was brought for and on behalf of plaintiff herein."

Here were allegations setting forth the court, the jurisdiction, the subject-matter, the scope and effect of

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the action, the connection of the plaintiff with that subject-matter, the final judgment bearing upon and having to do with the subject-matter, the common and general interest of the appellant herein in that subject-matter, and the connection of the plaintiff here with the force and effect of the former judgment. The averments here made were sufficient, in our judgment, to constitute a proper pleading of former judgment affecting the parties.

7. The question here, being one on demurrer, is not as to whether the appellant was in fact a party to the former action and bound by the judgment. The fact in that respect was for the court to determine if the same was denied. To express the matter concretely, we may put it thus: If the appellant here was in fact a party to the former action, and if the matter adjudicated in that action was the same as that sought to be adjudicated here, then the appellant would be bound by the judgment in the former action. If the former action was brought "for and on behalf of plaintiff, appellant here," and with reference to the identical subject-matter as that involved in the present action, and the defendants here were in fact successors to beneficiaries of that judgment, then such judgment would constitute a defense here. The proper averment of these elements, as we think they were properly averred in this instance, would stand against demurrer, and would require denial.

8. The plea of a former judgment affecting the same parties and the same subject-matter as involved in this case being sufficiently alleged, the question as to the fact asserted by the averment was one which, like all other matters of fact, was for the trial court if the same was denied; if not denied, it was deemed admitted. The matters alleged were susceptible of proof, and if proven, as alleged, would have constituted a defense that might have been available to defendant, respondent here. (*Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.) To the same effect is the case of *McSweeney v. Carney*, 72

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Ind. 430; *Walker v. Ogden*, 192 Ill. 314, 61 N. E. 403. No issue having been taken to the averment of former judgment, the same must be taken as true. (*Walker v. Ogden*, *supra*; *Levy v. Ryland*, 32 Nev. 460, 109 Pac. 905.)

The order and judgment appealed from must be affirmed.

It is so ordered.

NORCROSS, C. J.: I concur.

COLEMAN, J., concurring.

I concur in the order, for the reason that I think the matter pleaded in the second affirmative defense states a cause of action under section 5001, Revised Laws of Nevada, wherein it is provided that:

"When the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

In view of this statute, I think the allegation in the defense mentioned, wherein it is alleged that appellant knew of the pendency of the action pleaded in that defense, and that it was brought for and on behalf of the plaintiff, states a good defense. If that action was brought for and on his behalf, it seems clear that he should be bound by the judgment. Had the plaintiff filed a reply alleging that the plaintiffs in that action controlled the prosecution of that suit, and that it was so managed as to jeopardize the interest of the plaintiffs, or alleging a conspiracy between plaintiffs and defendants in that action to so control the proceedings as to prejudice the plaintiff in this action, or other fraudulent conduct, a different rule would no doubt apply, notwithstanding the fact that a question of common interest was involved, or that the parties were so numerous that they could not all be brought before the court.

In view of the fact that the judgment must be affirmed for the reason that the second affirmative defense is good,

Coleman, J., concurring

I do not deem it necessary for the court to pass upon the question as to whether the judgment should be affirmed for the reason that no reply was filed denying the matter pleaded in the first affirmative defense. I am inclined to the view that no reply was necessary to that defense, on the theory that it was not new matter. "'New matter' is matter in confession and avoidance." (*Ferguson v. Rutherford*, 7 Nev. 390.) It seems that it would have been necessary for defendant to have confessed the appropriation of water by plaintiff and sought to have avoided the effect of such appropriation. This was not done. On the other hand, if the allegations of this defense were true, plaintiff never appropriated the water at all. Hence there could have been no confession and avoidance. I am disposed to take the view that this defense comes within the rule that the mere statement of facts in an answer by way of defense, which is inconsistent with the facts alleged in the complaint, is, in effect, nothing more than a denial of the allegations of the complaint. (Bliss, Code Pl. 2d ed. 333; *Goddard v. Fulton*, 21 Cal. 430; *Alden v. Carpenter*, 7 Colo. 93, 1 Pac. 904; *Sylvia v. Sylvia*, 11 Colo. 319, 17 Pac. 912; *McDonald v. People*, 29 Colo. 503, 69 Pac. 703; *Cuenin v. Halbouer*, 32 Colo. 51, 74 Pac. 885.)

Argument for Appellant

[No. 2210]

H. WARREN, RESPONDENT, v. GLASGOW EXPLORATION COMPANY, LIMITED (A CORPORATION), APPELLANT.

[160 Pac. 793]

1. WORK AND LABOR—PLEADING—PROOF AND VARIANCE.

Under a complaint on *quantum meruit* for services, where a specified contract is proved fixing the price therefor, the stipulated price becomes the *quantum meruit* in the case.

2. LIMITATION OF ACTIONS—SERVICES OF ATTORNEY.

Where, by an attorney's contract, he was entitled to \$100 per year for general legal services, he had a cause of action for each year's services so rendered, and recovery by him for more than four years prior to action was barred.

APPEAL from Sixth Judicial District Court, Humboldt County; *Edward A. Ducker*, Judge.

Action by H. Warren against the Glasgow and Western Exploration Company, Limited. From a judgment for plaintiff, defendant appeals. **Modified and affirmed.**

T. A. Brandon, for Appellant:

Respondent has tried to avoid the bar of the statute of limitations by suing on a *quantum meruit*, with a continuing contract as a base. The testimony shows that he entered into an express contract, containing a stipulated price for his services each year. He could have sued either on *quantum meruit* or the implied contract, but he is seeking to avoid the bar of the statute of limitations; endeavoring to accomplish by indirection that which he could not accomplish directly. This the law will not permit. (Elliott on Contracts, vol. 3, par. 2657.) All of the cause of action of the respondent arising prior to four years before the commencement of the action is barred. (*Mosgrove v. Golden*, 101 Pa. 605.) "Under a general retainer to attend to all of a man's business, without stipulation as to the time and mode of payment, the fee for each service is due as soon as the service is rendered, and the statute of limitations begins to run immediately. (*Jones v. Lewis*, 11 Tex. 359.)

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Respondent cannot be heard to contend that there was a distinct retainer for each year of his employment, impliedly or otherwise, for his evidence shows that he relies upon a continuing contract, with the further purpose of avoiding the statute of limitations. In other words he was retained for the first year; impliedly, therefore, he was retained for the second year, and so on for each year of his alleged employment, and all his retainers prior to four years before the commencement of the action are barred by the statute of limitations. Respondent's theory of service by retainer for each year will not harmonize with a continuous contract. He cannot recover a series of retaining fees and still maintain that his contract was a continuing one and not barred by the statute of limitations.

J. A. Langwith, for Respondent:

This action having been brought under a complaint on *quantum meruit*, we were properly allowed by the trial court to prove a specific contract fixing the price for service. The stipulated price becomes the *quantum meruit* in the case. (*Burgess v. Helm*, 24 Nev. 249; *Fells v. Vestvali*, 2 Keyes, 152.)

There is a wide difference between a contract from year to year and a yearly compensation on a continuous contract. The evidence shows conclusively that the contract was not intended to last for only one year, but that the officers of the company were fully aware of the continuous nature of the employment, and therefore the statute of limitations did not begin to run until the completion of the services. (*Ah How v. Furth*, 13 Wash. 550, 43 Pac. 63; *Morrissey v. Faucete*, 68 Pac. 354; *Grisham v. Lee*, 61 Kan. 533, 60 Pac. 314; *Crampton v. Logan*, 28 Ind. App. 405, 63 N. E. 51; *Graves v. Pemberton*, 3 Ind. App. 71, 29 N. E. 177; *Laggart v. Levanny*, 1 Ind. App. 339, 27 N. E. 511; *Story v. Story*, 1 Ind. App. 284, 27 N. E. 573; *Carter v. Carter*, 36 Mich. 207; *Jackson v. Mull*, 42 Pac. 603; *Eetal v. Warren*, 138 S. W. 694.)

By the Court, NORCROSS, C. J.:

This is an appeal from a judgment and an order denying defendant's motion for a new trial. Plaintiff brought his action upon contract and prayed judgment in the sum of \$1,491.66 and costs.

After alleging the corporate capacity of defendant, the complaint alleges:

"That between the 16th day of December, 1898, and the 15th day of November, 1913, the plaintiff has continuously and at all times between said dates rendered services to the defendant, at its instance and request, as state agent, and resident agent upon whom process might be served, for the defendant in and for the State of Nevada, and as attorney for the defendant at its request, in counseling and advising the defendant and in attending in and about the business of the defendant and in prosecuting and defending certain suits for the defendant. That said services are reasonably worth the sum of \$100 per year for each and every year between the 16th day of December, 1898, and the 15th day of November, 1913. That the defendant has not paid the same or any part thereof."

Defendant's answer, among other alleged defenses, set up the statute of limitations as a bar to plaintiff's claim for compensation for services rendered prior to four years preceding the termination of such services.

By reply to defendant's answer, plaintiff and respondent denied the alleged bar of the statute of limitations, upon the ground that the services rendered were continuous. Judgment was rendered for the full amount prayed for.

Among the findings of the court appear the following:

"That the plaintiff, in the State of Nevada, for the period of fourteen years and eleven months, continuously (which said period began the 16th day of December, 1898, and ended on the 15th day of November, 1913), rendered and performed services for the defendant, at its instance and request, as state agent, and resident agent of a foreign corporation upon whom process may be served

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within the State of Nevada, and also as attorney at law at its instance and request in counseling and advising the defendant and in attending in and about the business of the defendant and in prosecuting and defending certain suits for the defendant. That said services were performed in an uninterrupted and continuous manner; and were performed under no employment that was for any definite period. That said services were reasonably worth the sum of \$100 for each and every year embraced in the period of their performance, as aforesaid; that is, to say, in the aggregate, the sum of \$1,491.66²³/₁₀₀."

It is contended that the findings, *supra*, are not supported by the evidence.

Relative to the contract in question, we quote the following from the testimony of plaintiff and respondent:

"Q. What has been your relations with the defendant? A. I have been the state agent and attorney for the defendant.

"Q. By whom were you employed? A. By Otto Stahlman.

"Q. Who was Otto Stahlman? A. General manager for the defendant company.

"Q. When did the employment commence? A. In the fall of 1898.

"Q. State the facts and circumstances as you remember them, Mr. Warren, attending the contract, if any, under which your services were performed. A. Mr. Stahlman and Mr. Farron came to my office and told me what they were going to do; that they were going to take charge of the operations of the Glasgow and Western Exploration Company and the Adelaide Star Mines Company. They discussed generally what the operations would be, stating where the operations were to be carried on and what property they had acquired; and they asked me if I wouldn't act locally for them and advise them in respect to general matters respecting the carrying on of their business. I asked them who they were acting for, under what authority. Mr. Stahlman told me that he was the general manager of both companies. * * *

And that Mr. Farron was the superintendent of mining, and that they were foreign corporations, owned by Scotch and English people. He represented that their operations would be very large and extensive. And they wanted to know what was necessary for such corporations to do in order to engage in business in this state. I advised them what was necessary to do to begin with, and he asked if I wouldn't act for them in small general matters and what it would be worth. We discussed the things to some extent, and I advised them, among other things, that they would have to employ an agent, that the law of this state required them to file certified articles of incorporation in every county in which they were engaged to do business, and required them to retain an agent to whom local process could be made. They asked me if I could act for them as agent, and I told them I could. We discussed then the compensation, and I told them those matters were of small moment, that they would very likely have no suits at all, and finally they suggested themselves \$200 a year, if that would be sufficient compensation for acting for them in a general way and for acting as agent, a hundred dollars for each company. I said, 'Yes,' but that I didn't care to act for them in that way, except that I was to have their general business, and we discussed what the general business would be, as to compensation, and finally concluded that I was to be paid for any special work I did, separately; no amount was fixed as to that. * * * Well, they told me that I was to have all the business; that I was to have \$200 a year for acting as agent and giving them advice in a general way; that I was to have all their business in this county and any other business, law business, or matters outside of being agent and giving a little advice, I was to have that business. * * * I received from the company in Glasgow, through the mail, certified copies of its articles of incorporation, of both companies, and later, as I state, I filed these articles in the different counties in which the companies were engaged in business, and later on, I won't say whether

it was in the fall of that year or the early part of the next year, I received two appointments as agent, one for each company, in writing, under the signatures of the officers of the company and under the seal of the company, and I filed these certificates of appointment as agent with the secretary of the State of Nevada."

Upon cross-examination plaintiff testified:

"Q. You had a conversation with them there? A. Yes.

"Q. In which it was agreed, as you testified, to receive \$100 a year. For what? A. As attorney in small matters, trifling things and as state agent. * * *

"Q. Did I understand you to say that you were to be paid in addition? A. Yes, sir.

"Q. For any work that you did? A. Any special work that I did, I was to be paid for it.

"Q. Then this hundred dollars was simply to act as a retainer? A. General retainer, to act as agent.

"Q. How long was that to last? A. Until it was stopped.

"Q. Indefinitely, in other words? A. Yes, there was no fixed time. * * *

"Q. Did you render any bill for that service? A. I don't think so.

"Q. Why not? A. Because I felt I had the money coming and that the company would take care of me.

"Q. In other words, you let it run until you got a bill of \$1,500 against each of these companies, for which you never presented a bill? A. I never presented a bill for acting as state agent."

1. The contract proved in this case was for a stipulated price per year for the value of the services to be rendered. The action, however, is to recover the reasonable value of the services, which is alleged to be the same as the amount shown by the testimony to have been stipulated. This is immaterial so far as the right to recover is concerned, for, as held in *Burgess v. Helm*, 24 Nev. 249, 51 Pac. 1026:

"Under a complaint on a *quantum meruit* for services, where a specified contract is proved, fixing the price for

services, the stipulated price becomes the *quantum meruit* in the case."

2. We think the defense of the statute of limitations interposed in this case should have been well taken. By the terms of the contract proven, respondent was entitled to be paid \$100 per year for his services. He could have presented a claim at the end of each year, and he had a cause of action for each year's services so rendered. (*Ennis v. Pullman Co.*, 165 Ill. 161, 46 N. E. 439; *Mosgrove v. Golden*, 101 Pa. 605, 2 R. C. L. 1056.) See, also, *Osborn v. Hopkins*, 160 Cal. 501, 117 Pac. 519, Ann. Cas. 1913A, 413, and note.

From the opinion of Magruder, C. J., speaking for the court in *Ennis v. Pullman Co.*, *supra*, we quote:

"It seems to be claimed that this is a case of indefinite hiring, and that the statute did not begin to run until the whole service was ended. We cannot concur in this view. Where an attorney is conducting a single suit, it has been held that the statute of limitations cannot commence running until the services contracted for have been performed by the ending of the suit, or by the termination of the retainer in some other mode. (*Walker v. Goodrich*, 16 Ill. 341.) But where attorneys are regularly employed at a salary given for advice and legal superintendence and other services rendered from day to day, there is no reason why they should not stand upon the same footing as other salaried employees, so far as the statute of limitations is concerned. (*Mosgrove v. Golden*, 101 Pa. 605; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Hale's Exrs. v. Ard's Exrs.*, 48 Pa. 22; *Phillips v. Bradley*, 11 Jur. 264.)

"Ordinarily when a man is employed under a general agreement, which fixes no term of service, and continues in service a long time, the hiring will be treated as a hiring by the year. (*Mosgrove v. Golden*, *supra*; *Davis v. Gorton*, 16 N. Y. 255, 69 Am. Dec. 694.) In case, however, of such long continued employment, the statute will ordinarily bar a claim for all outside of the five years immediately before the commencement of the action,

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unless there is evidence to take it out of the operation of the statute. (*Mosgrove v. Golden, supra*; *Thompson v. Reed, Admx.*, 48 Ill. 118; *Freeman v. Freeman*, 65 Ill. 106.)”

A number of other questions have been raised in the assignments of error and discussed in the briefs, but we think they are not of sufficient merit to require consideration here.

The judgment will be modified by reducing the same to the sum of \$400, and, as so modified, the judgment is affirmed.

[No. 2250]

THE STATE OF NEVADA, Ex REL. GEORGE A. COLE, AS STATE CONTROLLER OF SAID STATE OF NEVADA, PETITIONER, v. HARRY H. HILL, AS FORMER TREASURER OF THE COUNTY OF WASHOE, STATE OF NEVADA, AND D. W. DUNKLE, AS TREASURER OF THE COUNTY OF WASHOE, STATE OF NEVADA, AND THE CITIES OF RENO AND SPARKS OF THE COUNTY OF WASHOE, STATE OF NEVADA, RESPONDENTS.

[160 Pac. 772]

1. INTOXICATING LIQUORS—STATE LICENSES FOR CITY RETAIL SALES—DISPOSITION OF MONEY—“AMOUNT.”

Under Revenue Act of 1915 (Stats. 1915, c. 178), sec. 3, requiring persons disposing of liquor “in less quantities than a quart,” in a city, to take out a county license from the sheriff; section 6, requiring persons selling liquor either at retail or wholesale, in addition to other licenses, to take out a state license, section 8 providing for the sheriff, as ex officio collector, issuing and collecting for, a retail liquor license to one engaged in selling liquor in quantities less than five gallons, section 9, requiring one selling liquor in quantities in excess of five gallons to take out a wholesale state liquor license, section 10, providing that monthly the sheriff shall pay to the county treasurer “all” money received by him for state liquor licenses, “in like manner and form as is hereinafter provided for the payment of county license moneys,” and that in a county having a city therein he shall pay to it one-half of the “amount” of license moneys collected for disposition of liquors in less quantities than a quart, within its limits, half of the amount from state as well as county licenses for such disposition in quantities less than a quart is to be paid the city, and the balance only to the county

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treasurer, so that such half payable to the city is not included in "all moneys received" by the county treasurer for state liquor licenses "in accordance with the provisions of this act," for which section 11 requires him to account to the state treasurer, the word "amount," in section 10, referring to the total of two sums (citing Words and Phrases, Second Series, Amount).

Mandamus proceeding by the State, on relation of George A. Cole, State Controller, against Harry H. Hill, former treasurer of the county of Washoe, and others.
Writ denied.

Geo. B. Thatcher, Attorney-General, for Petitioner:

State liquor licenses are divided into two classes, wholesale and retail. A retail dealer is one who deals in liquor "in quantities less than five gallons"; a wholesale dealer, one who deals in liquor "in quantities in excess of five gallons." (Act of Mar. 22, 1915, secs. 8, 9; Stats. 1915, p. 236.)

The words "in quantities in excess of five gallons," and the words "in quantities less than five gallons," are descriptive.

Under the provisions of section 3 of the same act, county licenses are collected from any person dealing in liquors "in less quantities than one quart."

The closing paragraph of section 10 gives to incorporated cities one-half of the amount of "license moneys collected from persons dealing in liquors in less quantities than one quart." These words describe which license moneys shall be divided, and the only license moneys which comply with this description are those derived from county licenses, collected under the provisions of section 3 of the act.

Incorporated cities are entitled to one-half of the county liquor license moneys collected within their boundaries, but are not entitled to any part of either state retail or wholesale liquor license moneys provided for in sections 8 and 9 of the act.

L. D. Summerfield, City Attorney of Reno, for Respondents:

Section 10 of the act in question (Stats. 1915, p. 239)

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contemplates a division with incorporated cities of the moneys received from persons operating under state liquor licenses within the corporate limits. A person paying a state license under section 8 of the act to dispose in less quantities than five gallons also has necessarily included therein the privilege of disposing in less quantities than one quart. The county license also, by section 3 of the act, is one to dispose in less quantities than one quart, including the same privilege to this extent as the state license. Therefore, when the concluding clause of section 10 provides for the payment into the city treasury of one-half of the license moneys collected "for" disposing in less quantities than one quart, both state and county license moneys are included. The clause in controversy, by its very wording, provides for a division of the moneys collected for disposing in less quantities than one quart, from whatever source that privilege is derived.

The statute should be interpreted in accordance with the well-known rules and principles of statutory construction. (36 Cyc. 1102, 1118; *Torreyson v. Board*, 7 Nev. 19; *Ex Parte Siebenhauer*, 14 Nev. 365; *Ex Parte Prosale*, 32 Nev. 378, 108 Pac. 630.)

By the Court, MCCARRAN, J.:

This is an original proceeding in *mandamus*, instituted by petitioner, as state controller, to compel the treasurer of Washoe County to pay over certain moneys in his hands, received from the sheriff of that county as ex officio license collector. The authority for the act sought to be required of the county treasurer is found in the several sections of an act of the legislature of 1915 entitled:

"An act to provide revenue for the support of the government of the State of Nevada and to repeal all acts and parts of acts in conflict herewith." (Stats. 1915, p. 236.)

Section 3 of the act, among other things, provides:

"Any person or persons who may dispose of any spirituous, malt, or fermented liquors or wines, in less quantities than one quart, within the confines, or within

one mile thereof, of any city or town shall, before the transaction of any such business, take out a county license from the sheriff of the county in which he or she proposes to do such business, and pay therefor the sum of thirty dollars per quarter year, or proportionate amount for fractional quarter as hereinafter provided. * * *

Section 6 of the act provides:

"Every person, firm, company, or corporation manufacturing or selling, either at retail or wholesale, any spirituous, malt, or vinous liquors, shall, in addition to other licenses provided by law, take out a state liquor license as hereinafter provided, which license shall not be transferable by sale, assignment, or otherwise."

Section 8 of the act provides:

"The sheriffs of the respective counties, as ex officio collectors of licenses, shall issue and collect all state liquor licenses, and shall, upon the payment of one hundred (\$100), issue a retail state liquor license to any person, firm, company, or corporation engaged in selling spirituous, malt, or vinous liquors in quantities less than five gallons, and the word 'Retail' shall be written in red ink across the face of such license. * * *"

Section 9 provides:

"Any person, firm, company or corporation disposing of spirituous, malt, or vinous liquors in quantities in excess of five gallons shall be considered a wholesaler or rectifier, and shall pay a state liquor license of one hundred and fifty dollars (\$150) per annum, and the word 'Wholesale' shall be written across the face of such license, in red ink."

The section of the act most vital to the determination of the matter at bar, and which we are asked to construe here, is section 10, which in its provisions is as follows:

"On the first Monday in each month the sheriff shall pay over to the county treasurer all moneys received by him for state liquor licenses in like manner and form as is hereinafter provided for the payment of county license moneys; and the duties and liabilities of the sheriff, treasurer, and auditor with relation thereto shall be the

same as hereinafter prescribed with relation to county licenses. The county treasurer shall, between the second and third Mondays in each month, forward to the state controller a certified detailed statement of all moneys paid to him by the sheriff in accordance with this section, which statement shall show the number of each license, whether wholesale, retail, or druggists, to whom and date issued, period covered, amount of each license, and total amount received; which statement shall be furnished to the county treasurer by the sheriff and shall be the basis of the monthly settlement. In every county in this state which now has or may hereafter have a duly incorporated city government, it shall be the duty of the license collector of said county to pay into the city treasury one-half of the amount of license moneys collected from any person or persons for disposing of any spirituous, malt or fermented liquors, or wines, in less quantities than one quart, within the corporate limits of said city."

It must be observed that section 6 of the act contemplates the requirement of a state liquor license, in addition to other licenses provided by law, for every person, firm, company, or corporation manufacturing or selling liquors either at retail or wholesale. This section is complete within itself, and the words therein contained must be given their ordinary and usual significance.

Section 8 requires the taking out of a state liquor license, to be known as a retail license, and to be required of all persons, firms, companies, or corporations engaged in selling liquors in quantities less than five gallons.

By section 9 a state liquor license, designated as a wholesale license, is required to be taken out by all persons, firms, companies, or corporations disposing of liquors in quantities in excess of five gallons.

Manifestly the latter part of section 10, which requires the license collector to pay into the city treasury one-half of the amount of license moneys collected from any person or persons for disposing of any spirituous, malt, or fermented liquors, etc., in less quantities than one quart, does not apply to state wholesale liquor licenses,

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because by the provision of section 9, authorizing the issuance of such license, the provision is made that such license shall be issued only to those disposing of the liquor in quantities in excess of five gallons. The term "in excess of five gallons," as used in section 9, is exclusive of the term "in less quantities than one quart," as used in section 10. But does the term "in quantities less than five gallons," as used in section 8 with reference to state retail licenses, include that which is comprehended by the term "in less quantities than one quart," as used in section 10, applicable to the division of license moneys and the payment of one-half of the sum into the city treasury?

The whole contents of sections, 3, 4, 5, 6, 7, 8, 9, and 10 have to do exclusively and entirely with liquor licenses. Hence it will not be seriously contended, we apprehend, that any part of section 10 has to do with or refers to the payment or turning over of license moneys other than that secured from the several classes of liquor licenses.

Some contention is made that the word "all" as used in the first part of section 10 precludes the idea of a division of the money received by the license collector for state liquor licenses only. As we view this expression used in section 10, it must be read in conjunction with that which follows, and applies with equal force to the disposition required to be made by the license collector of county liquor licenses. All moneys received by the license collector for state liquor license must, as we view the provisions of the first part of section 10, be paid over to the county treasurer in like manner and form as is provided for the payment of county license moneys.

So we inquire: What is the manner and form provided by this statute for the turning over of county liquor licenses by the license collector? Indeed, we find no other provision in the statute in which the manner and form of paying over the license collected by the sheriff to another custodian, either state, county, or municipal, is provided for, save and except that manner and form prescribed in section 10 itself. So we look to section 10

for that manner and form in which or by which county licenses are to be turned over from the license collector to another custodian. The words "manner and form" are, as we view them, expressive of the statement to be rendered and the segregation to be made by the license collector as the same are provided for in the section. So the manner and form of paying over state liquor license moneys is the same manner and form that is to be followed in the paying over of county liquor license moneys.

This brings us to the significant part of section 10, which, unless we declare certain of its expressions to be devoid of meaning, is significant of the manner and form for the turning over by the license collector of liquor license moneys collected within his jurisdiction. It prescribes:

"In every county in this state which now has, or may hereafter have, a duly incorporated city government, it shall be the duty of the license collector of said county to pay into the city treasury one-half of the amount of license moneys collected from any person or persons for disposing of any spirituous, malt or fermented liquors, or wines, in less quantities than one quart, within the corporate limits of said city."

Section 3 of the act in substance provides that persons disposing of liquor in less quantities than one quart within the confines of any city shall take out a county license. Section 6 provides, in substance, that those who dispose of liquor in less quantities than one quart must secure a state retail liquor license in addition to other licenses. In these two sections, it will be observed, the specific designation is made of those who dispose of liquor in less quantities than one quart. These sections provide that both state retail liquor license and county liquor license shall be carried by the parties disposing of the liquor in a specific way, to wit, in less quantities than one quart. The same significant term is used in the latter part of section 10, wherein the manner and form of turning over the amount of moneys collected from licenses so issued is provided for; and there it is prescribed in substance that one-half of the amount of license moneys collected

from any person disposing of liquors in less quantities than one quart shall be paid into the city treasury where an incorporated city exists within the county.

In that manner and form prescribed by the statute for the disposition of the moneys collected no designation is made or exception created as to moneys collected from that class of dealers who dispose of liquor in quantities less than one quart and who must operate under the two licenses. If it were the intention of the legislature that the division of money should apply only to moneys collected from county licenses, we assume that that body would have found it as convenient to so declare, as was done in section 15 of the very same act, where, in dealing with another class of license, to wit, dance-house licenses, we find the statute to read:

"All moneys received for licenses under the provisions of this section shall be paid three-quarters into the county treasury and one-quarter into the state treasury for general county and state purposes respectively."

True it is that in sections 8 and 9 the licenses provided for thereunder are designated as state licenses; but the very fact that the latter part of section 10 makes no such designation as affecting a division of the money by the license collector is to our mind conclusive of the proposition that it was the intention of the legislature that it should apply to state and county licenses with equal force. Had the legislature intended otherwise, it would have so designated, at least by a substantial intimation. The first part of section 10, providing that the sheriff shall pay over to the county treasurer "all moneys received by him for state liquor licenses," if it stood alone in these words, might bear out the contention that the word "all" was intended to apply to state moneys only; but the term "in like manner and form as is hereinafter provided for the payment of county license moneys" fixes the proposition, and emphasizes the conclusion that all state liquor license money was to be subject to the same "manner and form" of distribution as was provided for with reference to county license moneys, and as to the

latter the division by the license collector is provided for specifically.

Section 11 is referred to as tending to clarify the situation. The county treasurer is by section 11 required to include in his regular semiannual statement with the state treasurer "all moneys received by him on account of state liquor licenses in accordance with the provisions of this act." What are "all moneys received by him for state liquor licenses in accordance with the provisions of this act?" The answer to that interrogatory comes from section 10, wherein it provides for a segregation of the money, not by the county treasurer, but by the county license collector before he renders his accounting to the county treasurer. Hence "all moneys received by him [the county treasurer] for state liquor licenses" signifies all moneys turned over from the county license collector to him as county treasurer. Those are all of the moneys for which he can be accountable, because the segregation takes place before the county license collector renders his statement to the county treasurer.

If it had been the intention of the legislature to require the county treasurer to account to the state treasurer for all the moneys collected from state licenses, language to this effect could easily have been used. How comprehensive and effective of the purpose it would have been if the legislature had said the county treasurer shall include in his regular semiannual statements with the state controller all moneys collected on account of state liquor licenses. But not so. The legislature, evidently mindful of the purpose sought to be accomplished, said:

"The county treasurer shall include in his regular semiannual settlements with the state treasurer all moneys received by him on account of state liquor licenses."

And then, to further emphasize that there were provisions in the bill which affected moneys collected from state liquor licenses by the county license collector, the legislature inserted the words "in accordance with the provisions of this act."

It is asserted that, inasmuch as the latter part of section 10, providing as it does for the division of liquor license moneys, was an independent statute enacted by the legislature of 1893 (Stats. 1893, p. 25), and that when this provision stood as an independent act no such construction was placed upon it as that contended for by respondent, and inasmuch as the sheriff of Washoe County construed the language of the statute of 1893 in the manner now contended for by petitioner, therefore this language, when incorporated into another statute which of itself repeals the act of 1893, should receive the same construction. This contention, we think, falls by the weight of its own position as it stands in the history of legislation upon the subject of revenue derived from liquor licenses in this state. It was not until 1905—twelve years after the enactment of the statute of 1893—that the legislature of this state provided for a state wholesale and a state retail liquor license (Stats. 1905, p. 228), and in that act a specific provision appears, wherein it is set forth:

"The sheriffs of the respective counties of this state are hereby required to make quarterly statements to and settlements with the state controller in the matter of the licenses herein authorized and required to be issued and collected, and to pay into the state treasurer quarterly all moneys by them severally collected for such licenses, taking his receipt therefor."

The provisions of the act of 1905 referring to the state retail and state wholesale liquor licenses were engrossed into what might be termed, at least for the purpose of convenience, a compilation of certain license acts theretofore enacted. By the statute of 1915, construction of which we are required to make here, all of the wholesale and retail liquor licenses acts, both state and county, were embodied into one law. The provision of the act of 1905, whereby the sheriffs of the several counties were "required to make quarterly statements to and settlements with the state controller, * * * and to pay into the state treasurer quarterly all moneys by them

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severally collected," was dropped out of the law, and in the place of such provision the legislature of 1915 said:

"On the first Monday in each month the sheriff shall pay over to the county treasurer all moneys received by him for state liquor licenses in like manner and form as is hereinafter provided for the payment of county license moneys."

And as a further provision and specific direction in place of the provision of the act of 1905 the legislature of 1915 said:

"In every county in this state which now has or may hereafter have a duly incorporated city government, it shall be the duty of the license collector of said county to pay into the city treasury one-half of the amount of license moneys collected from any person or persons for disposing of any spirituous, malt or fermented liquors, or wines, in less quantities than one quart, within the corporate limits of said city."

Not alone one-half of the county license moneys collected, as is contended by petitioner, but "one-half of the amount of license moneys collected," are the words of the statute. How are we to read into this provision a something not there found? How shall we say that this provision shall apply only to a certain class of liquor licenses, eliminating another class?

The word "amount," as used in the latter part of section 10, must be given its ordinary and usual meaning and significance. In Webster's Dictionary it is held to mean "the sum total of two or more particular sums or quantities," and courts have held that the word "amount" referred to the total of two sums. (See Words and Phrases Judicially Defined, Second Series.) The term, used as it is in the latter part of section 10, must, as we view it, be construed as referring to the total of all license moneys collected from any person or persons disposing of liquor in less quantities than one quart. If the word "amount," as used in the latter part of section 10, were intended to apply only to the total of county liquor licenses, why was it not so expressed by the legislature? And when the

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term is used, as here, at the conclusion of a section of the law, which section has to do exclusively with the disposition and segregation of the moneys collected by the county license collectors without specifying an exception, how can the word "amount" be construed as having a more limited significance than that of its usual and ordinary acceptance?

The latter part of section 10, as we view it, directs the division of license moneys to be applicable to both state and county licenses issued to parties disposing of liquor in less quantities than one quart.

The writ prayed for should be denied.

It is so ordered.

Per Curiam:

Petition for rehearing denied.

[No. 1966]

ROBINSON MINING COMPANY, RESPONDENT, v.
RICHARD A. RIEPE, HENRY M. FULMER, AND
ROY T. IVES, DOING BUSINESS UNDER THE FIRM
NAME AND STYLE OF FULMER & IVES, AND
E. W. HULSE, DEFENDANTS; BERTHA IVES,
APPELLANT.

[161 Pac. 304]

1. TROVER AND CONVERSION—TRANSFERRING STOCK—REFUSAL—LIABILITY.

Where a corporation's refusal to issue new stock certificates in smaller denominations for old certificates presented by a shareholder for that purpose is based upon its wrongful assertion of ownership of the stock, the corporation is liable to the shareholder for conversion of the stock.

APPEAL from Fourth Judicial District Court, White Pine County; *George S. Brown*, Judge.

Action by the Robinson Mining Company against Richard A. Riepe and others. From judgment against defendant Bertha Ives on her counterclaim, she appeals. **Reversed and remanded.**

Argument for Appellant

McElroy & Billings and Chandler & Quayle, for Appellant:

Respondent converted appellant's stock, because it asserted right and title to it in defiance of her right, and because it refused to cut it up into smaller denominations when such refusal clearly interfered with her right to dispose of the same.

A conversion is "any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent with it. * * * The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law conversion, be it for his own or another person's use." (Cooley on Torts, 3d ed. vol. 2, p. 859; Webb's Pollock on Torts, 2d ed. p. 435; *Hollins v. Fowler*, L. R. 7 H. L. 766; *University v. State National Bank*, 3 S. E. 359; *Coleman v. O'Neill*, 1 N. W. 848; *Richardson v. Longmont S. & D. Co.*, 76 Pac. 546; *Williams v. Smith*, 25 Atl. 1122; *Herrick v. Humphrey H. Co.*, 103 N. W. 685; *Bristol v. Burt*, 7 Johns. 254; *Gillett v. Roberts*, 57 N. Y. 28; *Cinnah v. Hale*, 23 Wend. 462.)

A certificate of stock is the evidence and written representation of a shareholder's title and right to a share in the net proceeds of all the property of the corporation. (*Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525; *Barstow v. Savage M. Co.*, 64 Cal. 388, 1 Pac. 349; *Craig v. Hesperia L. & W. Co.*, 45 Pac. 349; *Am. P. I. S. Co. v. State B. of S.*, 59 N. J. L. 389, 29 Atl. 160; *Heller v. National Marine Bank*, 89 Md. 602, 43 Atl. 800; *Merritt v. American S. B. Co.*, 79 Fed. 228.)

A share of stock, evidenced by the certificate of stock, denotes a mere right to a thing not in possession. The

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ownership of a "share," when evidenced by a certificate, gives the owner a beneficial interest which enables him to participate in the management and share in the profits of the corporation. To be possessed of a share is to be invested with the rights which constitute it. It is quite evident that this cannot be accomplished but by actual transfer or by operation of law. (*Storrow v. Texas C. C. M. & A.*, 87 Fed. 612, 615; *Clow v. Redman*, 6 Idaho, 568, 57 Pac. 437, 439; *Western U. T. Co. v. Poe*, 61 Fed. 449, 456.)

The refusal of a corporation, without right, to transfer stock on the demand of the stockholder constitutes a conversion. (*Kimball v. Union Water Co.*, 44 Cal. 173; *Payne v. Elliott*, 54 Cal. 339; *Fromm v. Mining Company*, 61 Cal. 629; *Ralston v. Bank of California*, 112 Cal. 213, 44 Pac. 476, 477; *Craig v. Hesperia*, *supra*; *Continental Co. v. Bliley*, 46 Pac. 633; *Schell v. Alston M. Co.*, 149 Fed. 439; *Humphrey v. Minn. Clay Co.*, 103 N. W. 338; *Herrick v. Humphrey Hardware Co.*, *supra*; *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.)

A demand need not be made in a case where the circumstances evidence that a demand would be useless and of no avail; and particularly so when the pleadings admit the exercise of dominion over the property and make claim of title. (*Hand v. Soodeletti*, 61 Pac. 373; *Perkins v. Barnes*, 3 Nev. 557; *Daggett v. Gray*, 42 Pac. 568; *Whitman v. Tritle*, 4 Nev. 494; *Ward v. Carson*, 13 Nev. 44; *Oakley v. Randolph*, 39 Pac. 698; *Becker v. Fergenbaum*, 45 Pac. 836; *People v. Van Ness*, 21 Pac. 554; *Davis v. Wiwona*, 52 Pac. 486; *Raper v. Harrison*, 15 Pac. 219; *Rosenau v. Syring*, 35 Pac. 844.)

Appellant could have more readily disposed of her shares in smaller denominations. The request for the cutting up of the shares into smaller denominations was within reason. The refusal of respondent to so cut up the stock clearly impeded and interfered with the opportunity to sell the stock. Nothing in the law is regarded as a greater interference with a property right than an obstacle to its alienation, and all rules of limitation imposed upon the right to freely dispose of property

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have, from time immemorial, been frowned upon, as against public policy. The first test of an absolute or fee-simple estate in property is an untrammelled right to alienate or dispose of it. A conditional or fee-tail estate could not be alienated. (*Schell v. Mfg. Co.*, 149 Fed. 439.)

Samuel W. Belford, for Respondent:

The action of conversion arises when the corporation refuses to transfer stock upon its books to a person entitled to such transfer. The present is not such a case. It is not pretended that the corporation refused to transfer stock to a proper transferee. The only dereliction charged against the respondent was its refusal to issue additional certificates of stock upon demand of a stockholder who already possessed this evidence of his title. Where a person acquires stock in a corporation, such person is entitled to receive from the corporation stock certificates which evidence the ownership of such person of a definite number of shares of stock. If the corporation refuse to furnish such certificates, the person entitled to them has a remedy in conversion or for damages resulting from such refusal. In this case, respondent discharged its liability to the stockholder by furnishing a certificate of title by the issuance of stock certificates to the owner of the shares of stock. Appellant's claim is for additional certificates of smaller denomination.

In order to give rise to a cause of action against respondent for its refusal to issue additional certificates of stock, it was necessary for appellant to prove the right to them, and to prove actual damage by reason of the failure of the respondent to provide such certificates of stock as appellant demanded. The conditions were not complied with, and consequently the judgment of the lower court should be affirmed.

By the Court, COLEMAN, J.:

This is the second appeal taken in this case, the former appeal having been taken by plaintiff: *Robinson Mining*

Co. v. Riepe, 37 Nev. 27, 138 Pac. 910. This appeal is taken by defendant Bertha Ives, from a judgment rendered against her on her counterclaim. The appeal is upon the judgment roll, and it is asserted that the conclusions of law as made by the trial court are contrary to the facts as found. The court found as follows:

"That on the 21st day of June, 1907, said defendant Bertha Ives was the owner and entitled to the possession of 27,500 shares of the capital stock of the said plaintiff company, the value of which was then the sum of \$11,000, and not the sum of \$82,500 as alleged in said counterclaim, and was in possession of two certificates representing said 27,500 shares of said capital stock, one of which was for 25,000 shares and the other was for 2,500 shares of said capital stock, being the same shares of stock specified in paragraph 6 of plaintiff's complaint. That on said 21st day of June, 1907, said defendant Bertha Ives presented said certificate to said corporation at its office in Ely, White Pine County, Nevada, and demanded that said corporation issue to her new certificates in smaller denominations representing a less number of shares each than the said original certificates in lieu of said original certificates for 27,500 shares, which said old certificates she then and there tendered to said corporation for cancelation upon the issuance of said new certificates. That said corporation then and there refused, failed and declined to issue such or any new certificates and as reason for and part of said refusal, failure, and declination wrongfully asserted title in itself to the whole of said stock, and denied that counterclaimant, Bertha Ives, had any title or interest therein whatsoever. That at that time shares of stock of the plaintiff company represented by certificates of smaller denominations were much more readily salable in the Ely district than shares represented by certificates as large as those so held by the defendant Bertha Ives and by her so presented for cancelation as aforesaid. But it is not true, as alleged in said counterclaim, that said plaintiff company did then or there, by reason of said facts or otherwise, wrongfully, unlawfully, maliciously, or

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otherwise, or at all, take or convert the said 27,500 or any shares of stock to its own or any use, or to the damage of said defendant Bertha Ives, or any one else, in the sum of \$82,500 or any other sum."

It is the contention of appellant that the facts found by the court show a conversion by the respondent of the stock owned by appellant. Counsel for respondent concedes in his brief that:

"The action of conversion arises when the corporation refuses to transfer stock upon its books to a person entitled to such transfer."

The authorities sustain this rule: *Kimball v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157; *Ralston v. Bank of California*, 112 Cal. 213, 44 Pac. 476; *Humphreys v. Minn. Clay Co.*, 94 Minn. 469, 103 N.W. 338; *Herrick v. Humphrey H. Co.*, 73 Neb. 809, 103 N. W. 685, 119 Am. St. Rep. 917, 11 Ann. Cas. 201. But it is contended that this case does not fall within this rule, since appellant merely sought to have her stock certificates canceled and new certificates, of smaller denominations aggregating 27,500 shares, issued to her in lieu thereof. The only case that we know of in which an allusion is made to the right to cut up a stock certificate is that of *Schell v. Alston Mfg. Co.* (C. C.) 149 Fed. 439. To our mind, the case at bar does not turn upon the right of appellant to have her stock certificate cut up, but upon the reason given by respondent for not doing so. When appellant presented her certificate and asked that new certificates be issued therefor, the refusal to do so was not based upon the ground that a stockholder of the company could not, as a legal right, demand that his stock certificate be cut up, but upon the ground that the respondent company owned the stock in question.

Hence it seems to us that the question of the legal right of appellant to demand that her two certificates for 27,500 shares of stock be canceled, and several certificates for a small number of shares, but all aggregating the 27,500 shares owned by her, is out of the case. We

think the logic of the rule laid down by Cook with reference to a refusal of a company to transfer stock is applicable to this situation. He says:

"When the corporation refuses to allow a registry for reasons other than those connected with the mere formalities of registry, or for reasons not given to the applicant, it waives the right to insist on them, and cannot afterwards claim that the appellant did not conform to such technicalities." (Cook, Stock and Stockholders, sec. 383; *Richardson v. Longmont S. & D. Co.*, 19 Colo. App. 483, 76 Pac. 546.)

In the case at bar the respondent refused to cut up the appellant's stock certificates for reasons other than those connected with the mere formality of cutting them up.

If applicant, after the refusal of the respondent to cut up the certificates, had obtained purchasers for the stock on condition that she would have it transferred to them, and the company had then refused to make the transfer for the reason that it asserted ownership, it is conceded by counsel for respondent that it would have been guilty of a conversion of the stock.

We believe that it is a well-recognized rule that the law does not require the doing of a vain thing. Appellant knew that respondent claimed to own the stock, and for that reason would not transfer it. Why, then, should she be compelled to do the vain thing of obtaining purchasers for the stock, knowing that she could not deliver it because respondent claimed to own it? In fact, how could appellant, in good faith, make a sale of the stock while respondent was asserting ownership of it? Suppose she had offered it for sale, and the person to whom she had offered it had said:

"The company claims to own this stock. You have no title to it, and no right to sell it. At best, if I buy it, I buy a lawsuit; therefore I will have nothing to do with it."

Was it necessary that respondent go to useless trouble

to find a purchaser, when she knew that it would avail nothing?

Now, it seems to us that the question for us to determine is this: Did respondent violate any right of appellant? To our mind, it clearly did. Respondent not only declined to cut up the stock certificates for the reason that it claimed to own the stock, but its defense in the trial court to appellant's counterclaim was based upon the ground that it was the owner of the stock. Lord Blackburn, in *Hollins v. Fowler*, decided by the House of Lords (Law Journal Reports 1875, vol. 44 [N. S.] p. 169), in determining whether certain acts constituted a conversion, said:

"I own that it is not always easy to say what does and what does not amount to a conversion. * * * It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification. From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into possession of the goods. And in considering whether the act is excused against the true owner it often becomes important to know whether the person doing what is charged as a conversion had notice of the plaintiff's title.

"There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which, if done in a *bona fide* ignorance of the plaintiff's title, are excused, though, if done in disregard of a title of which there was notice, they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion."

See, also, Pollock on Torts (8th ed.) pp. 357, 358.

It appears to us that the rule laid down by Lord Blackburn is of peculiar and striking application to the

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case at bar. The trial court found that the respondent refused to comply with appellant's request, for the reason that it claimed to own the stock. The court also found that respondent's claim of ownership was without legal right. Appellant was helpless. An attempt by her to sell the stock in small quantities, or at all, would have been in vain. Her dominion over the stock was absolutely terminated by the assertion of ownership by the company and a denial, of the ownership of appellant.

Another highly respected court uses the following language:

"In *McCombie v. Davis*, 6 East, 540, Lord Ellenborough said: 'According to Lord Holt, in *Baldwin v. Cole*, 6 Mod. 212, the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it.'" (*Gilmore v. Newton*, 6 Allen Mass. 171, 85 Am. Dec. 749.)

Again we quote:

"In *Glaze v. McMillion*, 7 Port. (Ala.) 279, 281, Golthwaite, J., said: 'It is believed that all conversions may be divided into four distinct classes: (1) By a wrongful taking; (2) by an alleged assumption of ownership; (3) by an illegal user or misuser; and (4) by a wrongful detention. In the three first named classes, there is no necessity for a demand and refusal, as the evidence arising from the acts of the defendant, is sufficient to prove the conversion.'" (*Strauss v. Schwab*, 104 Ala. 672, 16 South. 692.)

"It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it. No manual taking, on the defendant's part, is necessary." (*Pease et al. v. Smith et al.*, 61 N. Y. 481.)

It will be seen from the last three quotations that those courts go even further than did Lord Blackburn, and hold that no action is necessary on the part of the owner to make liable one who wrongfully assumes to own property,

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and in pursuance of such claim exercises exclusive domination over it, as in the case at bar. Such a statement of the law may seem exaggerated in a case where a horse, cow, or other personal property which is capable of being recovered in an action of replevin is involved; but in a case where the property is intangible, as in this case, and where a *mandamus* will not lie to compel the transfer of stock (*State v. Jumbo Ex. M. Co.*, 30 Nev. 198, 94 Pac. 74, 133 Am. St. Rep. 715, 16 Ann. Cas. 896; *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667), the full force of the rule thus announced can be fully appreciated. Since replevin is not available, and since our courts hold that *mandamus* will not lie to compel a transfer of stock, what recourse would appellant have, if not to an action for conversion? None that we know of. It seems to us that in the very nature of things appellant, and others similarly situated, are at the mercy of corporations unless conduct such as respondent was guilty of is held to be a conversion.

We are of the opinion that the judgment of the trial court should be reversed, and that judgment should be entered in favor of appellant and against respondent in the sum of \$11,000, the amount found by the court to have been the value of the stock at the time of the conversion, together with interest thereon at 7 per cent per annum from June 21, 1907, the date of the conversion, and for costs in both courts.

It is so ordered.

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[No. 2261]

STATE OF NEVADA, Ex REL. A. L. HAIGHT, PETITIONER, v. A. E. WILSON, AS COUNTY CLERK OF CHURCHILL COUNTY, STATE OF NEVADA, HATTIE E. FERGUSON, AND DEMOCRATIC COUNTY CENTRAL COMMITTEE OF CHURCHILL COUNTY, STATE OF NEVADA, RESPONDENTS.

[161 Pac. 306]

1. ELECTIONS—MANDAMUS—NOMINATIONS—VACANCIES.

Stats. 1915, c. 285, sec. 44, the general election law, provides that, should a vacancy occur in the nominees for any office, it may be filled before election day by the committee to which such power has been delegated, and Stats. 1915, c. 283, regulating nominations for public office by primaries, conventions, petitions, etc., by section 26 provides that vacancies in nominations occurring after any party convention shall be filled by the party committee, etc. The Democratic county convention nominated a candidate for clerk and treasurer, and on his declination took no further action and left the place blank in the certificate of nomination, and adjourned without delegating any authority to its committee, but the executive board of the committee filed a certificate of nomination. *Held*, that the filing of such certificate was unauthorized, and that *mandamus* would issue to compel the county clerk to exclude from the ballots at a coming general election the name of the candidate contained in such certificate.

PROCEEDING in *mandamus* by the State of Nevada, on the relation of A. L. Haight, against A. E. Wilson, as County Clerk of Churchill County, State of Nevada, and others. **Writ issued.**

A. L. Haight, for Petitioner.

Geo. B. Thatcher, Attorney-General, and *E. T. Patrick*, Deputy Attorney-General, for Respondents.

By the Court, MCCARRAN, J.:

This is an original proceeding in *mandamus*, instituted by petitioner to compel the respondent, as county clerk of Churchill County, to exclude from all ballots to be used at the coming general election in that county the name of Hattie E. Ferguson as candidate for the office of county clerk and treasurer.

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Petitioner predicated his right to the issuance of the writ upon the action of the Democratic county convention, inasmuch as that convention, according to the allegations of the petition, did not, during its session or prior to its adjournment, or at any time or at all, nominate any person as the candidate of the Democratic party for the office of county clerk and treasurer of Churchill County. The petition contains the following allegation:

"That on October 26, 1916, at said city of Fallon, one Fulton H. Sears presented to the above-named A. E. Wilson, as county clerk as aforesaid, a purported certificate of nomination, in words and figures as follows, to wit:

"'Certificate of Nomination.

"'At a meeting of the executive board of the Democratic county central committee of Churchill County, Nevada, held in the city of Fallon, in said county and state, on Saturday, the 21st day of October, A. D. 1916, at the hour of 1:30 p. m., due notice having been given to all committeemen of such meeting, among other things, the following resolution was unanimously carried, a quorum being present:

"'Be it resolved: The Democratic county central committee of Churchill County, Nevada, has designated its executive board, by proper resolution, to act in its stead during the interim of any regular meeting; and

"'Whereas, it now appears that there exists a vacancy in the Democratic nominations for the office of county clerk and treasurer of said Churchill County; and

"'Whereas, this committee feels that it is to the best interests of the Democratic party of this county that this said vacant nomination be filled:

"'Be it resolved: That the said executive board now proceed to fill said vacant nomination.

"'Thereupon the chair called for nominations to fill said vacancy, and Hattie E. Ferguson was duly nominated and seconded, and, there being no further nominations, the chair declared said nominations closed.

"'Thereupon Hattie E. Ferguson was unanimously

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nominated for the office of county clerk and treasurer for said Churchill County, Nevada, and declared the official Democratic nominee thereof.

"E. L. Bingham, Chairman,

"Fulton H. Sears, Secretary."

This certificate of nomination, so called, is duly verified by its chairman and secretary. It is alleged in the petition that upon this certificate of nomination, so termed, the respondent, as county clerk, unless prevented from so doing by an order of this court, will print upon the official election ballot the name of Hattie E. Ferguson as a candidate for the office of county clerk.

Attached to the petition as an exhibit we find what purports to be the minutes of the Democratic county convention, in which said minutes there appears, among other things, the following as a second transaction in the order of business:

"Second. Clerk and Treasurer. Mr. G. W. Goebel nominated and seconded. Mr. G. W. Goebel declined. Nomination left open."

At the conclusion of the minutes, we find the following item:

"A motion was made empowering the county central committee to fill any vacancies on the ticket; but, as this is already authorized by law, the motion was withdrawn."

From the record as it is before us, it would appear that the Democratic county convention had nominated a candidate for the office of clerk and treasurer. That nominee having declined to accept such nomination, no further action appears to have been taken by the convention relative to this office; and in the certificate of nomination filed with the county clerk the place was left without a nominee. The minutes of the convention declare that the body adjourned without conferring authority upon its committee or upon any committee or board or constituted body to do anything in behalf of, or in the name of, or by the authority of the convention.

The general law of this state applicable to elections (Stats. 1915, p. 479) makes special provision for the filling

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of vacancies where such vacancies occur from any cause in the list of nominees for any office. The statute is as follows:

"Should a vacancy occur, from any cause, in the list of nominees for any office, such vacancy may be filled any time before the day of election by the committee to which has been delegated power to fill such vacancies.

* * *

The statute regulating nominations for public office, and which is to a certain extent called in question here, is found in Stats. 1915, p. 453, and is entitled:

"An act regulating the nomination of candidates by political parties, providing for the holding of primaries and conventions, and regulating the manner of nominating candidates by petition."

Section 26 of the act (Stats. 1915, p. 460) provides:

"Vacancies in nominations occurring for any cause after the holding of any party convention shall be filled by the party committee of the county, or state, as the case may be."

It is clear from the record as it is before us, and especially from the minutes of the proceedings of the Democratic county convention of Churchill County—in fact, it is admitted by counsel for respondents—that power to fill vacancies existing in or that might for any cause occur in the list of Democratic nominees for county offices was not delegated by the Democratic county convention of Churchill County to its county committee nor to any other committee or board.

The act of filing the certificate of nomination in question here was, as we view the record, one for which the convention itself had extended no authorization. The convention during its session had attempted to nominate a candidate for the office of clerk and treasurer. The party receiving the nomination had declined. No further action was taken by the convention, and no authority was extended by the convention to its county committee, much less to any other body, committee, or board, to make any other nomination, or to fill the vacancy which the

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convention had itself created by failing to nominate a candidate for the office.

The writ, as prayed for, was by order of the court, at the conclusion of the argument, issued.

[No. 2233]

CLAUS P. JENSEN, PETITIONER, v. THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ESMERALDA, AND HON. J. EMMETT WALSH, JUDGE OF SAID COURT.

[161 Pac. 162]

1. CRIMINAL LAW—CONVICTION—NOTICE OF APPEAL—SUFFICIENCY—STATUTE.

Rev. Laws, 7513, provides that, on appeal from a conviction before a justice, appellant shall file with the justice and serve upon the district attorney a notice, setting forth the character of the judgment and his intention to appeal therefrom. A notice of appeal was addressed to the district attorney and to an acting justice of the peace, stating that defendant intended to appeal, and did thereby appeal, from a conviction in the justice court of receiving and buying personal property from an intoxicated person, and from the judgment and sentence of the justice court imposing a fine, and in the alternative an imprisonment, upon questions of both law and fact. *Held*, that the notice of appeal was sufficient.

ORIGINAL PROCEEDING in *mandamus* by Claus P. Jensen against the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda, and Hon. J. Emmett Walsh, Judge of said court. **Writ issued.**

Adams F. Brown, for Petitioner:

Mandamus will issue to compel a judge to act with relation to proceedings had before his predecessor, but not to proceed in a particular way. A court may be compelled to correct an error as to its jurisdiction, although composed of different members than at the time the error was committed. (26 Cyc. 198, 199.) *Mandamus* lies in criminal as well as in civil proceedings, where there is a clear legal right to be enforced, as well as a clear duty,

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and where there is no other remedy. (26 Cyc. 218; 33 Cent. Dig. 122.) Every material fact that should be set forth in the petition was plainly and fully set forth. If a *prima facie* case is shown, the pleading is sufficient. (26 Cyc. 432, 433; Rev. Laws, c. 73.)

The notice of appeal was sufficient. (Rev. Laws, 7513.) The method of taking appeals and the questions to be considered thereunder by the appellate court are matters of purely statutory regulation. (*Burbank v. Rivers*, 20 Nev. 81.) Notices of appeal are to be liberally construed, and they will be held sufficient if, by fair construction or reasonable intendment, the court can say that the appeal is taken from a judgment or an order in a particular case. (*Bliss v. Grayson*, 24 Nev. 422.) All the statutory requirements of an appeal from a justice court to the district court in a criminal case were complied with, and the additional requirement that notices of appeal from the district court to the supreme court must state that the party appealing does so appeal. (*Simpson v. Ogg*, 18 Nev. 29; *State v. Preston*, 30 Nev. 303.)

M. A. Diskin, District Attorney, for Respondent:

The notice of appeal was not sufficient. It was fatally defective for uncertainty, not sufficiently describing or identifying the judgment or judgments from which it was intended to appeal. The judgment or order appealed from should be sufficiently described in the notice of appeal so as to leave no doubt as to its identity. If it fails to do so, it is fatally defective. (*State v. Preston*, 30 Nev. 301; 2 Cyc. 866; *Oliver v. Harvey*, 5 Ore. 361; *Chipman v. Bronson*, 3 Ore. 320; *Beck v. Thompson*, 22 Nev. 368; *Crawford v. Wist*, 39 Pac. 218.)

By the Court, NORCROSS, C. J.:

This is an original proceeding in *mandamus*. Upon a trial before the justice of the peace of Goldfield township, petitioner, on the 11th day of March, was convicted upon a misdemeanor charge, and ordered to appear for

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sentence on the 13th day of March following. On the day appointed, sentence was imposed to the effect that petitioner be fined in the sum of \$100, and that he pay the costs accrued. On the 15th day of March following, petitioner filed and served a notice of appeal in words and figures following:

"In the Justice's Court of Goldfield Township, in the county of Esmeralda and State of Nevada. State of Nevada, Plaintiff, v. Claus P. Jensen, Defendant. Notice of Appeal. To the State of Nevada, Plaintiff Above Named, and to Its Attorney, M. A. Diskin, District Attorney of Said Esmeralda County, and to Alfred French, Acting Justice of the Peace of Goldfield Township Aforesaid, in the County of Esmeralda and State of Nevada: You and each of you will please take notice that Claus P. Jensen, the defendant in the above-entitled action, intends to appeal, and that he does hereby appeal, to the district court of the Seventh judicial district of the State of Nevada, in and for the county of Esmeralda, from the judgment of said justice's court made on the eleventh day of March A. D. 1916, finding this defendant guilty of the offense of receiving and buying certain personal property from persons who were in an intoxicated condition, and from the judgment and sentence of said court passed upon this defendant on the thirteenth day of March, A. D. 1916, under which it was ordered, adjudged, and decreed by the court that for said offense the defendant be fined in the sum of one hundred dollars and all costs, and if any part of said fine and costs be not forthwith paid, then he be imprisoned in the county jail of Esmeralda County, State of Nevada, one day for each two (\$2.00) dollars of the fine not paid.

"This appeal is taken on questions of both law and fact.

"Dated at Goldfield, Nevada, this fifteenth day of March, A. D. 1916.

"Adams F. Brown, Attorney for Defendant."

Upon motion of the district attorney, the appeal was

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dismissed for want of jurisdiction to entertain the appeal. This proceeding is to compel the respondent court to reinstate the appeal and try the case. It was the contention of counsel for respondent in the court below, and now in this court, that the appeal was not duly perfected because of alleged defects in the notice and undertaking. As the sufficiency of the undertaking only goes to the question of the right of the petitioner to be released from custody or to a stay of proceedings under the judgment pending the appeal (Rev. Laws, 7513), we are of the opinion that it is unnecessary to refer to that document. The jurisdiction of the district court to entertain the appeal is governed by the filing and service of the notice of appeal. By Rev. Laws, 7516, it is provided that:

"An appeal duly perfected * * * may be dismissed on either of the following grounds:

"1. For failure to take the same in time.

"2. For failure to appear in the district court when required."

The dismissal was not based on either of these grounds, but presumably upon the ground that the appeal was not duly perfected. Assuming that this is a proper matter of inquiry, we turn to the provision of the statute (section 7513, *supra*), which reads:

"The party intending to appeal must file with the justice, and serve upon the district attorney a notice entitled in the action, setting forth the character of the judgment, and the intention of the party to appeal therefrom to the district court."

The notice of appeal in question is entitled in the action; sets forth the character of the judgment and the intention to appeal therefrom to the district court; was filed with the justice and served on the district attorney. This is all that is required. Counsel for respondent indulges in the supertechnical contention that the notice refers to two judgments, and does not describe any offense known to the law. The fact that the offense is not described in the notice with the fullness requisite in a criminal complaint is immaterial. The purpose of

Points decided

the notice is merely to acquaint the justice, the district attorney, and the district court that an appeal is taken.

"The justice must, within ten days after the notice of appeal is filed, transmit to the clerk of the district court all papers relating to the case and a certified copy of his docket." (Rev. Laws, 7514.)

If the notice is not as lucid as it might be, a reference to the complaint and to the justice's docket is all that is necessary to make the whole matter clear.

The writ will issue as prayed for.

[No. 2197]

IN THE MATTER OF THE APPLICATION FOR THE DISBARMENT OF GORDON W. BAILEY AS AN ATTORNEY AT LAW.

[161 Pac. 512]

1. ATTORNEY AND CLIENT—DISBARMENT PROCEEDINGS—EVIDENCE—SUFFICIENCY.

In a proceeding for disbarment of an attorney, evidence, consisting in part of an affidavit, held to support a charge that respondent by falsely and wilfully representing to an officer that affiant was defendant in a divorce action in which respondent was attorney for plaintiff, procured the service of summons on affiant and a false affidavit of service.

2. ATTORNEY AND CLIENT—DISBARMENT—GROUNDS.

An attorney's action in knowingly and fraudulently procuring the service of summons in a divorce action in which he was counsel for plaintiff, upon another than defendant, and by falsely representing to the officer that the person served upon was said defendant, procured him to make a return of service showing falsely that the summons had been duly served upon said defendant, was misconduct sufficient for disbarment.

APPLICATION by the Nevada Bar Association for the disbarment of Gordon W. Bailey as an attorney at law.
Respondent disbarred.

A. Grant Miller, L. N. French, and E. F. Lunsford, for Petitioner.

For Respondent, no appearance.

Opinion of the Court—McCarran, J.

By the Court, MCCARRAN, J. :

Application for disbarment in this instance is made by and through a committee duly appointed by the Nevada Bar Association.

Pursuant to the petition, citation was issued to the said Gordon W. Bailey, requiring him to appear on Thursday, the 30th day of December, 1915, and show cause, if any he might have, why he should not be disbarred. An order was duly made, upon application and statutory affidavit, directing service of said citation by posting and publication. The citation was duly published, proof thereof having been submitted to this court in the form of an affidavit of the publisher of the Nevada State Journal, showing that citation was published as directed for a period of six consecutive weeks commencing on the 12th day of October, 1915, and ending with the issue of date the 25th of November, 1915. Proof of posting in the manner prescribed by law was made by the affidavit of A. Grant Miller, Esq. No appearance was made in this court for or in behalf of said Gordon W. Bailey; and on November 21, 1916, the default of the said Bailey was entered.

Gordon W. Bailey, whose license is sought to be revoked, was an attorney at law, duly licensed by this court to practice law in all the courts of the State of Nevada. The application for disbarment in this instance is based upon the ground that the said Gordon W. Bailey, in violation of his duties as an attorney at law and of the duties imposed upon him by his oath of office as such attorney at law, has been guilty of misconduct in office.

Several charges of misconduct, and indeed some evidence bearing out most of them, were presented to this court by the testimony under oath of A. Grant Miller, Esq., a witness called in behalf of the bar association committee.

One specific charge of misconduct made in the complaint, and which the court deems sufficient for disbarment, is as follows:

"That said Gordon W. Bailey, while acting as one of the attorneys for plaintiff in the divorce action of

Francisca Redondo v. Demetrio Redondo, then pending in the Second judicial district court of the State of Nevada, in and for the county of Washoe, and numbered 10,966, fraudulently and wilfully procured the service of the summons in the said action to be made upon one Pierre Couste, on or about the 28th day of July, 1915, the said Gordon W. Bailey then and there well knowing that the said Pierre Couste was not the defendant in the action and so procured the said service to be made by falsely representing to one William O'Brien, as server of the said summons that the said Pierre Couste was the defendant in said action, and by so falsely representing to the said William O'Brien that the said Pierre Couste was Demetrio Redondo, procured the said William O'Brien to make a return of service of the said summons showing falsely that the said summons had been duly served upon the said Demetrio Redondo, and that upon the said false affidavit of service the said Second judicial district court proceeded to the trial of said action and ordered and decreed a divorce of the parties thereto."

Supporting the charge was evidence presented to this court by the testimony of A. Grant Miller, Esq., and William O'Brien, and the affidavit of Pierre Couste. The affidavit of Pierre Couste, offered in support of the charge, is as follows:

"Pierre Couste, being first duly sworn, deposes and says: I did on or about the 15th day of July, 1915, I went to the office of Gordon W. Bailey, an attorney, offices in the Journal Building in the city of Reno, Nevada; I said I knew a lady who wanted to get a divorce and I would send her to him; he asked me where the husband was, but I did not say anything about it; the lady's name is Francisca Redondo; I told him I didn't know where her husband was; I brought Mrs. Redondo to Bailey because Bailey could talk Spanish and she could talk Spanish and not English; I afterward went with Mrs. Redondo to Bailey's office; at this time Mr. Bailey asked Mrs. Redondo where Mr. Redondo was and Mrs. Redondo said to Mr. Bailey that she did not know; that she had not seen him

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for two years. I never saw Mr. Redondo in my life; I don't know him; I told Mr. Bailey my name was Pierre Couste; I asked Mr. Bailey how long it would take to get her a divorce; he said maybe a week or two; afterward Mr. O'Brien came to my house and asked me to come to Bailey's office; I went; Mr. O'Brien gave me some papers, and said something to me, and I said, 'Yes, I think so'; I laid the papers on Mr. Bailey's table; Mr. Bailey asked me if those papers were all right, and I said, 'I think so'; I did not take the papers away; I cannot read much English; I have been in Reno about seven months; I never saw Redondo in my life or in Reno; I heard Mr. Bailey ask Mrs. Redondo where Redondo was when I visited Bailey's office before, and Mrs. Redondo told Bailey she didn't know, but thought he was in Spain, in Madrid; I did not know that Mr. Bailey was pointing me out as Redondo; I gave Mr. Bailey \$60 for Mrs. Redondo to pay for her divorce; I know nothing about these law matters, but Mr. Bailey told me he would fix it up all right."

1. The charge is amply supported—so much so that the court made the order of disbarment from the bench at the time of submission and before preparing this opinion.

2. Records such as that found in the career of Gordon W. Bailey present a chapter in human conduct difficult to understand. Youth, energy, ability, genial and pleasing personality, all combined in one individual, would indicate something better than a climax painted in the dark colors of studied, consummated fraud and deception. Condemnation is the first blush that comes to the cheek of shocked propriety. But propriety should be an exacting, a charitable, mistress. Condemnation neither explains nor rectifies; and, while it may scourge, it teaches no lesson. We may enforce the laws of man; we may interpret his constitutions and his codes, but we can offer no solution for the varying and conflicting laws that, emanating from an unseen power, seem to govern the idiosyncracies we find in mankind. The potter's thumb that molds the bowl of human nature leaves many a dent,

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and the symmetry we seek may, when found, in our ideal, serve only to cover up the greater flaw. At the close of a chapter in the life of a young man in which were written the elements of fraud, cunning and deceit, however hesitatingly we may approach it, there remains for us but to write the word—the climax to which such elements lead—disbarred.

It is so ordered.

[No. 2251]

WILLIAM O. LEACH, APPELLANT, v. MASON VALLEY
MINES COMPANY (A CORPORATION), RESPONDENT.

[161 Pac. 513]

1. MASTER AND SERVANT—PERSONAL INJURIES—WORKMEN'S COMPENSATION LAW—RELEASE—VALIDITY.

Under Workmen's Compensation Act (Act of March 24, 1911, Stats. 1911, c. 183), section 11, allowing workmen to elect any other remedy at law, where a servant, a citizen and resident of California, executed in California a full and fair release of his master from liability for injuries received in his employment in Nevada, which was valid in California, it was a valid defense to action by him in Nevada for such injuries, notwithstanding Rev. Laws, 5652, providing that no acceptance of any insurance, relief benefit, or indemnity by the person entitled thereto shall constitute any bar to any personal injury action, for, the cause of action being transitory, and being completely barred in California, it was completely extinguished everywhere.

APPEAL from Second Judicial District Court, Washoe County; *R. C. Stoddard*, Judge.

Action by William O. Leach against Mason Valley Mines Company. From judgment for defendant, plaintiff appeals. **Affirmed.**

Dixon & Miller, for Appellant:

The alleged release comes within the provisions of section 5652, Revised Laws, and cannot constitute any defense in bar of appellant's cause of action. The allegation that the release was executed in California makes no difference, because the employment, the injuries and the action were all in Nevada, and the law of the latter must

Argument for Appellant

necessarily govern. The alleged release attempts to set up a contract which is contrary to the policy of the state, and could not, therefore, be enforced by our courts. (*Lawson v. Halifax-Tonopah Mining Co.*, 36 Nev. 596.)

Objection being made, it was the duty of the lower court to exclude the release from the evidence, or at most to allow it to be used, not in bar but merely for the purpose of giving the jury an opportunity to reduce the amount of the consideration from their verdict, if they found that this was a consideration moving from the respondent and not from the Guardian Casualty Company. It was pleaded in bar, and not by way of reduction of the verdict. It was offered in evidence in bar, and was admitted as in bar of plaintiff's right of action, was so treated by the court all through the trial, and in the final decision of the trial judge in directing a verdict for the defendant. (*Robinson v. Baltimore & Ohio Ry. Co.*, 237 U. S. 84, 59 L. Ed. 851; *Lawson v. Halifax*, *supra*.)

Even if the release had, in law, constituted a *prima facie* bar of plaintiff's right of action, he was still entitled to have the several issues raised by his replies and supported by his evidence submitted to the jury for their decision; and the trial court very greatly erred in refusing to submit these issues to the jury for their decision. "On motion for directed verdict, it is not within the province of the court to weigh the evidence; but plaintiff is entitled to have the most favorable view of the evidence taken in his behalf." (*Hales v. Michigan Central Ry.*, 200 Fed. 533; *Bolton Pratt Co. v. Chester*, 210 Fed. 251; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754; *Worthington v. Elmer*, 207 Fed. 306; *Erie R. R. v. Weber*, 207 Fed. 293; *Erie R. R. v. Schults*, 183 Fed. 673; *Blount v. Railroad*, 61 Fed. 375; *C. O. Ry. v. King*, 99 Fed. 251; *Erie R. R. v. Rooney*, 186 Fed. 16; *M. & O. Ry. v. Yockey*, 103 Fed. 365; *Milwaukee Ins. Co. v. Rhea*, 123 Fed. 81; *Byers v. Pa. Steel Co.*, 159 Fed. 347; *Tenn. Copper Co. v. Caddy*, 207 Fed. 297; *Yazoo Ry. Co. v. Wright*, 207 Fed. 281; *Evans v. Josephine Mills Co.*, 113 Ga. 1097; *Mahuken v. Board*, 59 N. J. 404.)

Argument for Respondent

Brown & Belford, W. H. King, and P. T. Farnsworth, Jr.,
for Respondent:

Every fact and circumstance surrounding the execution of the release was fully disclosed and testified to by appellant, and no pleading could be drawn which, under the facts in the case, would in any manner affect the binding force of the release. There is not a suggestion in the record of any fraud or misrepresentation whatsoever on the part of respondent or any of its representatives. While appellant in numerous places in the record asserts that he made his settlement with the insurance company, it conclusively appears from his own testimony that he did know and understand that he was thereby settling his claim for damages as distinguished from any claim for insurance. There is no authority which holds that the mere undisclosed mental state of a party to a contract, unaccompanied by any fraud or misrepresentation on the part of the other party, will relieve him of his obligation under such contract. "The salutary power of courts of equity to rescind or reform contracts which do not express the real intention of the parties is not to be extended to cases where the contract, because of the mistake of one of the parties, fails only to express the meaning of that party, and he seeks relief purely on the ground of his own mistake." (*Moffett Co. v. City of Rochester*, 91 Fed. 28.)

"Every written contract carries the strong presumption that it expresses the terms agreed upon between the parties to it, and ought not to be reformed except when it clearly and satisfactorily appears that there has been a mutual mistake, or a mistake on the part of the plaintiff accompanied by fraud on the part of the defendant, or by such acts on his part as would clearly be inequitable between the parties." (*Kleinsorge v. Rohse*, 25 Ore. 51; *Ramsey v. Smith*, 32 N. J. Eq. 28; *Deseret National Bank v. Dinwoodey*, 17 Utah, 43; *Crane v. McCormick*, 28 Pac. 222; *Comer v. Granniss*, 75 Ga. 277; *Griffin v. O'Neill*, 29 Pac. 143; *Brown v. Levy*, 69 S. W. 255.)

In the case at bar appellant confessedly retained the

Argument for Respondent

full amount of the settlement, and has made no offer to return same, or any part thereof. "But there is another insurmountable obstacle in the complainant's way upon this feature of this case, and that is, although she desires to set aside the contract of release, she still retains the consideration, and has never offered to return it. Where a party attempts to rescind a contract, the rescission must be complete. He cannot affirm it in part and reject it in part. Common honesty would require him seeking to escape the burdens of the contract to return the benefits which he has received. This is not only the rule of common honesty and fairness, but has been recognized by the courts from time immemorial." (*Barker v. Northern Pacific Ry. Co.*, 65 Fed. 460; *McLean v. Clapp*, 141 U. S. 429; *Hill v. Northern Pacific Ry. Co.*, 113 Fed. 914; *Valley v. Boston R. Co.*, 68 Atl. 635; *Louisville Ry. Co. v. McElroy*, 37 S. W. 844; *Norwich v. Girton*, 24 N. E. 984.)

Even if the contract of settlement had been made between citizens of Nevada within the State of Nevada, it would be a valid contract, and to uphold the release would in no way violate any statute of Nevada or conflict in the slightest degree with the decision of this court in the case of *Lawson v. Halifax*, 36 Nev. 596. Appellant was at all times a resident of the State of California, and, at the time the contract of settlement was made, was a resident and citizen of that state. At all times in question, respondent was a citizen and resident of the State of Maine. These facts are conclusively established, not only by record but by the removal proceedings, pursuant to which the state court of Nevada retained jurisdiction of the cause solely by reason of the fact that neither party to the action was a resident or citizen of the State of Nevada. A cause of action for personal injuries is a transitory cause of action, which follows its owner wherever he goes, and may be sued upon in any state where jurisdiction of the defendant can be secured. (*Dennick v. Railroad Co.*, 103 U. S. 18; 4 Labatt, Master and Servant, sec. 1620; *Christensen v. Floriston Pulp and Paper Co.*, 29 Nev. 552; *McIntire v. McIntire*, 16 D. C. 344.)

"Compromise or settlement, when full and complete and fairly made, operates as a merger and bars all right to recover on all claims and causes of action included therein." (8 Cyc. 516; *Oglesby v. Attrill*, 105 U. S. 611.)

When appellant saw fit to settle his controversy in California, he extinguished his cause of action. If his cause of action was extinguished, then manifestly when he crossed the state line to institute the present suit in the courts of Nevada, he had nothing to bring with him. The settlement which the statute of Nevada says shall not constitute a bar must be construed to mean a contract made and executed within the State of Nevada. The law of the place of the contract controls. (*International Harvester Co. v. McAdams*, 124 N. W. 1042; *Pritchard v. Norton*, 106 U. S. 124; 9 Cyc. 667.)

By the Court, NORCROSS, C. J.:

This is an action for damages for personal injuries sustained by appellant while employed in respondent's mine, commonly known and called the "Mason Valley Mine," in the county of Lyon, State of Nevada.

As a defense to appellant's alleged cause of action, respondent in its answer alleged that a compromise and settlement of any claim of appellant against respondent, on account of said injuries, was made between appellant and respondent in the city of San Francisco, State of California, on the 11th day of December, 1912, and that respondent then and there paid to appellant the sum of \$2,175 in full settlement of said claim; that appellant, in consideration of such payment, and for other valuable consideration, made and delivered to the defendant a release of all liability by reason or on account of the said injuries and that said release was duly acknowledged by said plaintiff before a notary public in and for the city and county of San Francisco, and was and is in words and figures as follows, to wit:

"San Francisco, December 11, 1912.

"Received of Mason Valley Mines Company the sum of two thousand one hundred seventy-five dollars (\$2,175)

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in consideration whereof I hereby release and forever discharge the said Mason Valley Mines Company, its successors and assigns, from any or all claims and demands, actions and causes of action, and liability of every kind and nature whatsoever for, upon or on account of or by reason of any loss, damage, injury or liability sustained or which may be sustained by me in consequence of injuries received by me, the undersigned, William O. Leach, on or about the 3d day of March, 1912, in the Mason Valley Company's mines in the State of Nevada, resulting in loss of limb, and eyesight and other injuries.

W. O. Leach."

Upon the conclusion of the taking of testimony at the trial, the court instructed the jury to return a verdict in favor of the defendant. This instruction constitutes one of the 101 assignments of error in this case.

The only question necessary to consider in this case, we think, is whether appellant is bound by the compromise and settlement of his claim for damages made by him with respondent in the State of California. There is no substantial conflict in the evidence relative to the making of the settlement in question. It was a result of negotiations covering a considerable period of time, including correspondence in which the precise terms of the final agreement were discussed. There is no contention or room for contention of any fraud upon the part of respondent in the procurement of the settlement with and the obtaining of the written release from appellant. The amount paid by respondent to appellant was approximately and possibly more than he could have received, had he elected to have settled with respondent under the provisions of an act of the legislature of this state, approved March 24, 1911 (Stats. 1911, p. 362), entitled:

"An act determining certain employments and industries to be especially dangerous, establishing a system of compensation for accidents to workmen engaged therein, requiring employers or contractors carrying on such industries to pay compensation, entitling injured workmen or their legal representatives to receive such

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compensation, fixing the amount of same and the manner of payment, fixing the time within which claims for compensation must be made, prescribing the manner and method of giving notice to such owner or contractor of such accident, providing for the manner of settling disputed claims by arbitration, providing for their final determination by courts of justice, and granting to courts of justice certain additional powers in proceedings under this act, determining what persons shall be liable under this act."

Section 11 of said act provides:

"Nothing in this act contained shall be held or deemed to require any workman or his personal representatives to proceed under its terms and provisions for the recovery of compensation of damages for death or accidental injury. But if the workman or his personal representatives shall so elect, he or they may disregard the provisions of this act and may pursue any other remedy at law for the recovery of such compensation of damages for or on account of such death or injury. The right of election or choice of remedies shall be exercised solely by such workman or his representatives."

It is the contention of appellant that the settlement made by him with respondent in the State of California cannot be interposed as a complete defense to his action by reason of Rev. Laws, 5652, which provides:

"That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to, or death of such employee; *provided, however*, that upon the trial of such action the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the person entitled thereto."

This provision of our statutes was sustained in *Lawson v. Halifax-Tonopah M. Co.*, 36 Nev. 591.

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We concur, however, in the contention of respondent that this provision of our statute can have no application in this case, for the reason that appellant's cause of action was transitory. (*Christensen v. Floriston Pulp and Paper Co.*, 29 Nev. 552; *Dennick v. Railway Co.*, 103 U. S. 18.) Such a cause of action follows its owner and may be sued upon in any state where jurisdiction of the defendant can be secured.

As appears from the record in this case, appellant was at all times a citizen of the State of California. At the time the contract and settlement was made, he was a resident and citizen of that state. Such settlement was in accordance with the laws of the State of California and was a complete bar to any action which might be instituted in that state to recover damages for such injuries. Such settlement in the state of his residence was a complete extinguishment of his chose in action. When he came to the State of Nevada, after such settlement, he brought nothing with him that could form the basis of an action, because he had finally settled his cause of action in the state of his residence. (*Oglesby v. Attrill*, 105 U. S. 611; *Ogden v. Saunders*, 12 Wheat. 369; 8 Cyc. 516; 36 Cyc. 829.)

It is unnecessary to consider other assignments of error. The judgment is affirmed.

Per Curiam:

Petition for rehearing denied.

Argument for Appellant

[No. 2239]

CHARLES CAREY, RESPONDENT, v. GEORGE H. CLARK, APPELLANT.

[161 Pac. 713]

1. BOUNDARIES—LAND CONVEYED—COURSES AND DISTANCES—"PERMANENT MONUMENT."

It is a fundamental rule in construing conveyances that courses and distances give way to permanent monuments, and the northerly side line of a street, extended, is in effect a "permanent monument."

2. REFORMATION OF INSTRUMENTS—BURDEN OF PROOF.

In suit to quiet title against defendant claiming under a conveyance which he prayed to have reformed to comply with plaintiff's agreement to convey, alleged in the answer, the burden of proof was on the defendant to establish his contention as to the description of the property intended to be conveyed by virtue of the original agreement.

3. APPEAL AND ERROR—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Where the evidence was conflicting, and there was substantial evidence to support the decision of the trial court, the supreme court cannot disturb the findings.

4. DEEDS—CONSTRUCTION BY PARTIES.

In suit to quiet title against a defendant who sought reformation of his deed to comply with plaintiff's agreement to convey, alleged in the answer, where the parties themselves had construed an ambiguous provision of the agreement, the trial court properly refused to sustain the defendant's contention contrary thereto.

5. TRIAL—PROVINCE OF COURT—DETERMINATION OF FACTS FROM CONFLICTING TESTIMONY.

Where the testimony of defendant and his witnesses was controverted by plaintiff's witnesses, it was the exclusive province of the court below to determine the facts from the conflicting testimony.

6. EVIDENCE—CONTROL OF TESTIMONY BY PHYSICAL FACTS.

Physical facts will control testimony.

APPEAL from Sixth Judicial District Court, Humboldt County; *Edward A. Ducker*, Judge.

Suit by Charles Carey against George H. Clark. From a judgment for plaintiff, and an order denying his motion for new trial, defendant appeals. **Judgment and order affirmed.**

R. Gilray, for Appellant:

Failure to convey all of the land described in an agreement, even though a portion thereof was conveyed,

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would be as much a failure to comply with the terms of the contract as though no part of the land had been conveyed. "A court of equity will, in the exercise of its acknowledged jurisdiction, afford relief by compelling the delinquent party to perform his undertaking according to its terms and the manifest intention of the parties." (*Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963.)

Appellant had by his affirmative answer set up mistake and inadvertence as a defense to the action, and prayed for a decree reforming the deed, to make it conform to the original agreement and the true intention of the parties. That he was entitled to this relief, is fundamental. (*Home Co. v. Frietas*, 153 Cal. 680, 96 Pac. 308; *Lauser v. Moppins*, 44 Tex. 472, 99 S. W. 109; *Field v. Clayton*, 117 Ala. 538, 67 Am. St. Rep. 189; *Flynn v. Finch*, 157 Iowa, 378, 114 N. W. 1058; *Butler v. Threlkeld*, 117 Iowa, 116, 90 N. W. 584; *Conner v. Baxter*, 124 Iowa, 99 N. W. 726; *Beal v. Martin*, 48 Neb. 479; *Henderson v. McKernan*, 151 Ill. 273, 37 N. E. 867; *Walden v. Skinner*, *supra*; *Perkins v. Herring*, 110 Va. 822; 19 Am. & Eng. Ann. Cas. 342, and cases cited in note thereto; *Sullivan v. Moorehead*, 99 Cal. 157, 33 Pac. 796.)

Salter & Robins, for Respondent:

The testimony shows, and the lower court found it to be true, that there is no mistake in the deed; that it gives to the appellant all that the agreement allowed. A reformation is asked on the ground of mutual mistake. There is no evidence that respondent made a mistake. Even if it be admitted that there is evidence of mistake, is it clearly made out by proofs entirely satisfactory, and is there nothing short of a clear and convincing state of facts showing the mistake? If not, the judgment of the lower court must be affirmed. (19 Ann. Cas. 344, 350.) The judgment of the lower court is based on conflicting evidence. (*Palmer v. Culverwell*, 24 Nev. 114; *Wilson v. Wilson*, 23 Nev. 267.)

By the Court, NORCROSS, C. J.:

Respondent brought suit against appellant in the court below to quiet title to a certain parcel of land in the town

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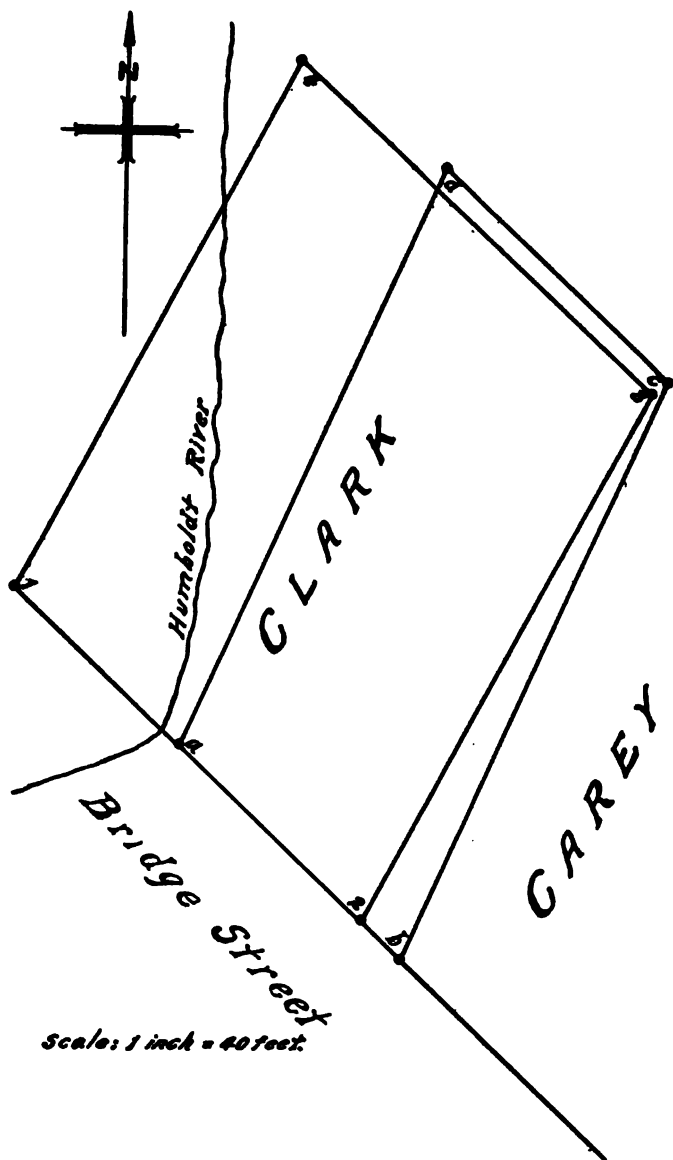
of Winnemucca. Appellant, in his answer, denied certain of the material allegations in the complaint and, for a further defense and by way of cross-complaint, alleged mutual mistake in the description contained in a certain deed made by the respondent as grantor to the appellant as grantee, which alleged mistaken description was relied upon by respondent in support of his alleged cause of action. Appellant prayed for reformation of the said deed to comply with the agreement alleged in the answer. Judgment was for the plaintiff. From the judgment and from an order denying a motion for a new trial, defendant has appealed.

From the evidence it appears that on the 12th day of December, 1911, an agreement in writing was entered into between the plaintiff and the defendant, whereby the plaintiff agreed to convey to defendant by good and sufficient deed the following-described premises:

"Fronting sixty-four feet on the extension of Bridge Street to the Humboldt River on the northeasterly side of said extension, extending back from said extension of Bridge Street, between parallel lines one hundred and twenty-five feet, the four corners of said piece of ground to be designated and marked by permanent posts by the parties hereto."

Shortly after the making of the said agreement of December 12, 1911, the parties marked the boundaries of the land intended to be conveyed pursuant to said agreement. It appears that the corners were designated by small stakes rather than by "permanent posts." Several months later, on the 27th day of March, 1912, plaintiff made and executed a deed in pursuance of said prior agreement and delivered the same to the defendant, and it is this deed which defendant alleges, by reason of mutual mistake, does not comply with the terms of the agreement. The diagram (p. 154) shows the premises which the plaintiff contended was conveyed by the deed of March 27, 1912, and the premises which the defendant contends should have been conveyed by said deed and which he asks that the deed be reformed to convey. The

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land which the plaintiff contends was conveyed by the said deed is marked on the diagram by the lines 1, 2, 3, 4. The land which the defendant contends should have been conveyed is marked by the lines a, b, c, d.

1. By the description contained in the deed in question, the center of the center pier of a concrete bridge spanning the Humboldt River was used as a starting-point for determining the corners of the land which the deed purports to convey. It is clear that there is an error in the description of the starting-point which should have been the northerly end of the pier. As it is a fundamental rule in construing conveyances that courses and distances give way to permanent monuments, and as the northerly side line of Bridge Street extended is, in effect, a permanent monument, the misdescription in the deed, to this extent, is immaterial.

2, 3. The burden of proof was on the defendant to establish his contention as to the description of the property intended to be conveyed by virtue of the original agreement. The defendant submitted testimony to establish the fact that the alleged corner "a," marked upon the diagram, was fixed by a stake driven in the ground at the time plaintiff and defendant fixed the boundaries of the land to be subsequently conveyed by deed. Plaintiff in his testimony denied that the stake was fixed at this point. Upon the contrary, that it was fixed several feet farther to the west on the northerly side line of Bridge Street, extended, near the then bank of the Humboldt River; that the point where the stake was originally fixed had become eroded away. The evidence was conflicting as to all of the corners which the defendant contends were the corners fixed by the parties to the original agreement. The court found in favor of the plaintiff upon all of the issues. As the evidence was conflicting, this court, upon an established principle of appellate procedure too well settled to require a citation of authorities, cannot disturb the findings where the evidence is simply conflicting and where there is substantial evidence to support the decision of the court below.

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4. It is the contention of counsel that the land should extend back from the extension of Bridge Street "between parallel lines 125 feet"; that the depth of the lot in question should be 125 feet, measured upon a line at right angles from the northerly side line of Bridge Street extended. This portion of the agreement may be regarded as ambiguous. Counsel for respondent contends that the meaning of this provision was simply that the side lines should be parallel and 125 feet in length. There is some evidence in the case that both parties construed this provision of the agreement to be in accordance with the contention of the respondent. The deed itself describes the side lines as being 125 feet in length. No objection to this description was interposed by the defendant for a long time after his receipt of the deed in question. It appears, also, that defendant constructed a temporary fence along what he supposed was the northerly and easterly side lines of the land in question. The side line of the fence so constructed was substantially 125 feet in length. The parties themselves having placed a construction upon the meaning of this provision of the agreement, we think the court below did not err in refusing to sustain this latter contention of defendant.

The description in the deed is of a rectangular tract, the end lines of which are one hundred feet in length, while the agreement called for only sixty-five feet fronting on the extension of Bridge Street. No particular point is made of this description, however, as the controversy was entirely over the situation and length of the true easterly side line as designated on the ground by the parties shortly after the agreement to convey was entered into.

5. Counsel for respondent do not question the law contended for by counsel for appellant as applied to a state of facts as testified to by the defendant and his witnesses. However, as the testimony of defendant and his witnesses was controverted by the witnesses for the plaintiff, it was the exclusive province of the

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court below to determine the facts from the conflicting testimony.

6. Counsel for appellant has contended that plaintiff's testimony is contrary to the physical facts. If this were clearly so, the physical facts would be controlling. There is evidence, however, that the river bank has changed by reason of erosion, and, hence, that the physical facts were not the same at the time of the trial as at the time of the agreement.

There appears to be no material questions in this case other than controverted questions of fact. The evidence is conflicting, and we cannot say the judgment is not without substantial evidence to support it.

The judgment and order are affirmed.

[No. 2203]

H. LOOSE, RESPONDENT, v. LILLIAN LARSEN,
APPELLANT.

[161 Pac. 514]

1. SALES—ILLEGAL CONSIDERATION.

Generally where goods are sold for the express purpose of enabling the buyer to accomplish an unlawful or immoral purpose, there can be no recovery for their price.

2. SALES—ILLEGAL CONSIDERATION.

Generally where the vendor of goods merely has knowledge that the purchaser intends to use them for an immoral or illegal purpose, and does nothing to aid in carrying out such purpose, he is entitled to recover therefor.

3. INTOXICATING LIQUORS—CONTRACTS—VALIDITY—NOTE FOR PRICE.

A note for balance of indebtedness for liquors sold and delivered to the maker, engaged in conducting a house of ill-fame within the restricted distance from a church, was not invalid, though the seller knew the liquors would be resold upon the premises; there being nothing unlawful in the sale nor any law prohibiting sale of liquors at such house, since the buyer had a license to sell liquor there.

APPEAL from Sixth Judicial District Court, Humboldt County; *Edward A. Ducker*, Judge.

Action by H. Loose against Lillian Larsen. Judgment for plaintiff. From order denying motion for new trial, defendant appeals. **Affirmed.**

Argument for Respondent

Salter & Robins, for Appellant:

"Whatever tends to interfere with the beneficial operation of the statute is unlawful and against the policy of the law." (*Sheldon v. Pruessner*, 35 Pac. 203.)

"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of the country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff." (*Valentine v. Stewart*, 15 Cal. 387.)

"If the contract is illegal, it will not be enforced." (*Drexler v. Tyrrell*, 15 Nev. 114.)

"A contract which has the direct effect of promoting sexual immorality is void." (6 R. C. L. 716.)

"Where goods are sold for the express purpose of enabling the buyer or beneficiary to accomplish an unlawful purpose, the agreement is void and there can be no recovery." (9 Cyc. 573; *Ball v. Putnam*, 55 Pac. 773; *Standard Furniture Co. v. Van Alstine*, 62 Pac. 146; *Ballerino v. Ballerino*, 82 Pac. 199.)

"Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it." (*Armstrong v. Toler*, 6 L. Ed. 468.)

R. M. Hardy, for Respondent:

In order to bar recovery on an illegal contract, the party seeking relief must have participated in the unlawful act or purpose concerning which the contract was void. "But the principle that a court will lend assistance to one who founds his cause of action upon an illegal act, applies in general only when it appears that the very party who is seeking aid from the court participated in the unlawful purpose. It has been said that the test of its application is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to

which he himself is a party." (Elliott on Contracts, sec. 645.)

It is an ancient principle, and a well-founded one, that the law does not punish a wrongful intent when nothing is done to carry that intent into effect. Much less will the law punish or penalize the bare knowledge of the wrongful intent, without any participation in it. Where the sale is not necessarily *per se* a violation of the law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money. (*Hodgson v. Temple*, 5 Taunt. 181; *Wallace v. Lark*, 12 S. C. 576.)

The plaintiff is not only not debarred from recovery by the rule, but it appears that the rule should be invoked against the defendant in her attempt to establish an affirmative defense. (*Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128; *Mahood v. Tealza*, 26 La. Ann. 108.)

By the Court, COLEMAN, J.:

This is an appeal from an order denying a motion for a new trial.

The judgment in this case is in favor of respondent, who was the plaintiff in the trial court, and is based upon an action to recover judgment upon a certain promissory note executed by appellant. For defense to the cause of action mentioned, the answer alleged that the note described in the complaint was given to cover a balance of an indebtedness due plaintiff for liquors sold and delivered by him to defendant, who was engaged in conducting a house of ill-fame within the restricted distance from a church edifice which was used for religious worship, knowing that said liquors would be resold by the defendant upon said premises to the inmates of said house of ill-fame and the visitors thereto in order to encourage patronage of said house, that the same might be made more profitable.

Appellant contends that, since a contract which is founded upon an immoral or illegal consideration is void,

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and since it is against the law of Nevada to conduct a house of ill-fame within a certain distance of a church edifice which is used for religious worship, as did appellant, and since the sale of the liquors mentioned encouraged such violation of the law by appellant, there is no valid consideration for the note sued upon, and hence the order refusing to grant defendant a new trial was error.

1, 2. It is the general rule of law that where goods are sold for the express purpose of enabling the buyer to accomplish an unlawful or immoral purpose, there can be no recovery for the price of the goods sold; but where the vendor merely has knowledge that the purchaser intends to use the goods for an immoral or illegal purpose, and does nothing to aid in carrying out the immoral or illegal purpose, the vendor is entitled to recover. We quote from Cyc. as follows:

"It is held in England that, where the agreement is innocent in itself, but the intention is unlawful, as where goods are bought or money borrowed to be used for an unlawful purpose, the mere fact that the other party knows of such purpose renders the agreement illegal and void. * * * In the United States, while some courts have followed the English rule, most of the courts have taken a different view, and have held that mere knowledge of the seller of goods or services that the buyer intends an illegal use of them is no defense to an action for the price or for rent." (9 Cyc. 571, 572.)

Ruling Case Law says:

"A question which is apparently involved in some obscurity is whether a contract is rendered illegal by the fact that one party knows of the other's intention to further an illegal purpose by means of the contract, as, for instance, to use the subject-matter thereof for an unlawful purpose. That there is some difference of opinion on the subject there would seem to be no doubt. From some decisions the rule is deducible that knowledge of the other party's illegal object may, at least under some circumstances, indicate an intention to aid the

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unlawful object or constitute participation in an unlawful act. However, in a majority of the decisions dealing with particular contracts, mere knowledge by one of the parties of the other's intention to use the subject-matter for an unlawful purpose has been held not to render the contract illegal." (6 R. C. L. pp. 696, 697.)

The Supreme Court of South Carolina, in *Wallace v. Lark*, 12 S. C. 576, 32 Am. Rep. 516, uses the following language:

"We are not disposed, however, to rest the case here, but are rather inclined to adopt the rule laid down by Lord Mansfield in *Hodgson v. Temple*, 5 Taunt. 181, that mere knowledge of the vendor that the purchaser intends to make an illegal or immoral use of the article purchased is not sufficient to defeat action for the purchase money. There must be something more; something to show that the vendor was to participate in the illegal transaction, or that his intention in making the sale was not the ordinary purpose to dispose of his goods to the best advantage, but to aid or promote the illegal or immoral purpose for which article was bought."

Again we quote:

"One who has received the benefits of the complete performance by the plaintiff of a contract which was not *malum in se* nor *malum prohibitum* cannot successfully defend an action for the payment of his indebtedness which has accrued therefrom on the ground that either he or another intended to do some unlawful act which was no part of the consideration nor of the performance of the agreement." (*Hanover Nat. Bank v. First Nat. Bank*, 109 Fed. 422, 48 C. C. A. 423.)

The Supreme Court of New Hampshire, in *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205, after reviewing all of the decisions which had been rendered at the time that case was before the court, reached the conclusion that mere knowledge that goods sold are intended by the purchaser to be used unlawfully was not sufficient to prevent recovery for the purchase price of the goods.

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It would serve no useful purpose to here review the cases at length which sustain this view, and we content ourselves by calling attention to the authorities which appear in the notes to the citations to Cyc. and Ruling Case Law, *supra*.

The Supreme Court of the United States, in *Hanauer v. Doane*, 12 Wall. 342, 20 L. Ed. 439, said:

"Where to draw the precise line between the cases in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods, will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definition."

3. While no doubt it is difficult in many cases to know just where to draw the line where the purchaser intends to make an unlawful use of the goods bought, we do not think this is such a case, because appellant intended to make a lawful use of the goods. There was certainly nothing unlawful or immoral in the sale by respondent to appellant of the liquors, nor is there anything in the laws of this state which prohibited the sale of liquors at the house which was occupied by appellant. In fact, she had a license from the duly constituted authorities to sell liquor upon the premises in question. The use to which appellant intended to put the liquors, and to which in fact they were put, being perfectly legal, we are unable to see that the doing by respondent's grantee, with the goods purchased, that which she had a legal right to do, though done with a bad motive, as was known by respondent, could in any way affect the respondent's right of recovery. No authority has been called to our attention, nor have we been able to find one, which holds that a person who sells goods to another who intends to resell them in a legitimate manner, though such legitimate resales may incidentally encourage an illegal or immoral business, and all with the knowledge of the vendor, cannot recover. Yet that is what we are asked to hold in this case.

While we are anxious to maintain every rule of law which tends to promote civic decency, we are of the opinion that to sustain appellant's contention would be

Argument for Relator

to take a step which neither the law nor sound business principles will justify.

It is ordered that the order denying appellant's motion for a new trial be affirmed.

[No. 2241]

STATE OF NEVADA, EX REL. F. FREYESLEBEN,
AUSTRO-HUNGARIAN CONSUL, RELATOR, v. NINTH
JUDICIAL DISTRICT COURT OF THE STATE
OF NEVADA, IN AND FOR THE COUNTY OF
WHITE PINE, AND HON. C. J. McFADDEN,
JUDGE OF SAID COURT, RESPONDENTS.

[161 Pac. 510]

1. **MANDAMUS—REMEDY BY APPEAL—REFUSING REMOVAL OF ADMINISTRATOR.**

Where a petition was presented in the district court for removal of an administrator, setting up his alleged wrongful acts, and, after hearing both petitioner and respondent, decision was rendered dismissing the petition, such action was not reviewable by *mandamus*, since the court exercised jurisdiction and discretion in hearing and deciding the case and petitioner had a plain, speedy, and adequate remedy at law by appeal from such decision under Rev. Laws, 6112, providing for appeal from decisions in probate matters.

2. **MANDAMUS—FUNCTION OF WRIT.**

Mandamus will lie to compel a certain prescribed duty to be assumed by a tribunal, board, or officer, but will not operate beyond a point where that tribunal, board, or officer has the right to exercise discretion.

3. **MANDAMUS—SCOPE—REMEDY BY WRIT OF ERROR.**

Writ of *mandamus* will not assume the function of a writ of error, nor will it serve to require an inferior tribunal to act in any particular manner or to enter any particular judgment or order.

ORIGINAL PROCEEDING in *mandamus* by the State, on the relation of F. Freyesleben, Austro-Hungarian Consul, against the Ninth Judicial District Court in and for the county of, White Pine, and another. **Writ denied.**

A. G. Breeland, for Relator:

It is the duty of respondent to receive the petition of relator and to pass upon the evidence submitted. A consideration of the evidence will disclose that it

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is the imperative duty of respondent to remove the administrator of the estate. (Rev. Laws, 6097.)

When a court refuses jurisdiction of a subject-matter properly before it for determination, *mandamus* is the proper remedy. (*State v. Moran*, 37 Nev. 404.) Respondent was without power to dismiss the petition. (Rev. Laws, 5236.) No appeal lies from such an order in probate proceedings. (Rev. Laws, 6112.)

G. F. Boreman and A. Jurich, for Respondents:

Under numerous decisions of this court upon similar applications, the writ of mandate will not issue to review or correct alleged errors of the inferior court after it has acted upon a matter before it, nor to control judicial discretion or revise judicial action. (*Cavanaugh v. Wright*, 2 Nev. 166; *State v. Wright*, 4 Nev. 119; *State v. Commissioners*, 8 Nev. 309; *Floral Springs M. Co. v. Rives*, 14 Nev. 431; *State v. Murphy*, 19 Nev. 89; *State v. Curler*, 26 Nev. 356; *Floyd v. District Court*, 36 Nev. 349.)

If relator desired to have this court review the action of the district court in deciding adversely to him upon his petition for the removal of the administrator, he had a plain, speedy, and adequate remedy by appeal; and therefore is not in a position to invoke this extraordinary remedy. This court has heretofore held that an appeal will lie from an order refusing to revoke letters of administration: (*In Re Bailey's Estate*, 31 Nev. 377.) The relator's remedy was by appeal from the order of the inferior court. (Rev. Laws, 6112.)

By the Court, MCCARRAN, J.:

This is an original proceeding in *mandamus*.

On November 22, 1911, one A. B. Witcher, of Ely, White Pine County, Nevada, was appointed administrator of the estate of Thomas Odolovich, deceased. Subsequently, proceedings were instituted in the lower court, by and through the representatives of the Austro-Hungarian consul, for the removal of the administrator theretofore

appointed, and for the appointment of J. B. Dixon, Esq. The petition presented in the lower court for the removal of the administrator sets up, among other things, the assumption of control by A. B. Witcher as administrator of the estate of Thomas Odolovich, deceased; the filing by the administrator of an inventory and appraisal of the property and effects belonging to the estate; and certain other acts on the part of the administrator, such as a compromise settlement with the Giroux Consolidated Mining Company for the death of the deceased, the sale and disposition of certain property by the administrator, alleging in this respect failure on the part of the administrator to properly or legally conduct such sale and failure to make proper accounting for the proceeds thereof. The petition further relates failure on the part of the administrator to properly save and preserve property and effects of the estate.

The administrator, being cited to appear and show cause why his letters should not be revoked, responded by answer. On the hearing by the lower court, evidence was offered pro and con the several matters raised by the petition; and after the submission of the matter, an order was made, which we find in the following words:

"In view of the authorities cited and the showing made at the hearing, the petition for a dismissal of the administrator, A. B. Witcher, will be denied, and the petition dismissed, with costs against petitioners, and it is so ordered."

Petitioner in the lower court comes here by original proceedings in *mandamus* praying that the writ issue commanding the district court:

"(1) To vacate the order of said court denying and dismissing the relator's petition for the removal of the administrator, to restore the petition on the calendar in said court for further proceedings, and to allow the appearance of the said Austro-Hungarian consul on behalf of said alleged heirs, and to decide said matter upon its merits.

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"(2) To vacate the order of said court refusing and disallowing the application of said consul for a continuance of the hearing upon the account of the administrator and refusing counsel additional time in which to file exceptions to the account.

"(3) To vacate the order of said district court approving the amount of the account of the administrator and to declare that said account be declared open for filing objections, and that the consul be allowed to appear therein and be allowed a reasonable time to prepare and file objections to said account."

The right of petitioner to a writ of *mandamus* is challenged by respondent, upon the ground that the matter was regularly heard and determined by the lower court and therefore *mandamus* will not lie to review the proceedings; further, that petitioner here has a plain, speedy, and adequate remedy in the ordinary course of law.

In the case of *Floyd v. District Court*, 36 Nev. 352, 135 Pac. 923, we said:

"In a case where the district court takes jurisdiction and acts, its acts will not be subject to review by a writ of mandate, but where such tribunal refuses to take jurisdiction at all, when by law it ought to do so, or where having obtained jurisdiction it refuses to proceed in its exercise, *mandamus* is the proper remedy. Errors committed in the exercise of judicial discretion cannot be made the subject of review, nor can they be corrected by a writ of *mandamus*, but where a district court erroneously decides that it has no jurisdiction, the writ of *mandamus* is the proper remedy to compel that tribunal to do that which the law prescribes it should do—assume jurisdiction and proceed with the cause."

In the light of this rule, we review the record as it is before us in the petition. We find an application to revoke letters of administration. Under this application, evidence parole and documentary was introduced, entertained, and considered by the lower court. Both petitioner, as representative of the foreign consul, and the administrator theretofore appointed in the matter of the

estate offered and had introduced evidence in support of their respective contentions. At the conclusion of the proceedings the matter was submitted to the lower court and was by the judge of that court taken under consideration and advisement. Later a decision was arrived at and rendered by the judge of the lower court, which decision is concluded in the language heretofore quoted.

Cases such as the one at bar are to be distinguished from those presenting a record which clearly shows that the lower court refused to act judicially in the determination of a question of fact duly presented, or erroneously divested itself of jurisdiction. The line that divides these two classes of cases is, we think, well expressed by the words of Mr. Justice Christiancy, speaking for the Supreme Court of Michigan in the case of *People ex rel. Wiley v. Judge of Allegan Circuit*, wherein he said:

"I think the true principle upon which a majority of the cases may be reconciled is that if the inferior court has acted judicially in the determination of a question of fact, or a question of law, at least if the latter be one properly arising upon the case itself, and not some collateral motion or matter—that is, if the case or proceeding before it, upon the facts raised the particular question in such a shape as to give the power judicially thus to determine it—then such determination, however erroneous, cannot be reviewed, nor can any order the court may have made, or action it may have taken in consequence of it, be disturbed or reversed or reviewed by *mandamus*, if the action or order be such as would be justified by the same decision or determination when correctly made." (*People ex rel. Wiley v. Judge of Allegan Circuit*, 29 Mich. 487.)

1, 2. In the case at bar, the district court assumed jurisdiction, entertained the proceedings, heard the evidence in support of petitioner's contention, and rendered a determinative judgment based upon the showing made, and either a correct or incorrect interpretation of the law applicable to the specific question in furtherance of which the showing was made. What more could the

lower court do if the writ were to issue now? Would it reverse its judgment entered upon the showing made? Would it take a different view of the law arising upon the case? Is it the function of the writ of mandate to review errors of discretion or judgment and reverse decisions based thereon? An answer to such query is found in the established principles of law applicable to the function of this extraordinary writ, which may be stated thus: The acts or duties, the performance or non-performance of which rests in whole or in part on the discretion or judgment of the inferior tribunal, board, or officer, will not be required by the writ of *mandamus*. On the other hand, duties which are in their nature purely ministerial, or which are by law clearly and specifically required to be performed, and in the performance of which no element of discretion may be exercised by the tribunal, officer, or board required so to do, will be compelled by the writ. The rule may be otherwise stated that the writ will lie to set in motion the machinery of the law, so to speak, whereby a specifically prescribed duty must be assumed by a given tribunal, board, or officer, but will not operate beyond the point where that tribunal, board, or officer has the right to exercise any degree of discretion and judgment. (High's Extraordinary Legal Remedies, sec. 24.)

3. It needs no citation of authority to support the well-established rule that the writ of *mandamus* will not assume the function of a writ of error, nor will it serve to require the inferior tribunal to act in a particular manner or to enter any particular judgment or order. On the contrary, it serves only to compel the doing of some act which it is the clear, legal duty of the lower court in some way to do.

The Supreme Court of the State of Colorado, in the case of *People ex rel. Denison v. Butler*, 24 Colo. 401, 51 Pac. 510, ably reviewed the question here under consideration, and the decision of that court goes a long ways to support the position we take here. As we view the question here presented, petitioner might have availed

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himself of that plain, speedy, and adequate remedy laid down by our code of civil procedure (Civil Practice Act, sec. 255; Rev. Laws, 6112), wherein it is prescribed:

"Any person interested in, affected by, and aggrieved at the decision and decree of the district court appointing an executor or administrator, revoking letters, allowing a final account, or disallowing it, decreeing a distribution or partition, order or decree, confirming or setting aside a report of commissioners, admitting or refusing a will for probate, and any other decision wherein the amount in controversy equals or exceeds, exclusive of costs, one thousand dollars, may appeal to the supreme court of the state, to be governed in all respects as an appeal from a final decision and judgment in action at law."

This court, in passing upon the question of appeal in matters of this kind, in the case of *In Re Bailey's Estate*, 31 Nev. 377, referred to this statute and said:

"From a mere reading of this section, and the circumstances disclosed by the record in this case, it is clearly manifest to us that an appeal will lie from the order refusing to revoke letters of administration."

It has been repeatedly held by this court that under the provisions of our statute *mandamus* will not lie where there is a plain, speedy, and adequate remedy at law. (*State v. Guerrero*, 12 Nev. 105; *Mayberry v. Bowker*, 14 Nev. 336; *State v. Boerlin*, 30 Nev. 473.)

For the reasons herein set forth, the writ as prayed for should be denied.

It is so ordered.

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[No. 2259]

MARY WREN, ADMINISTRATRIX OF THE ESTATE OF THOMAS WREN, DECEASED; MARY WREN, AND THOMAS WREN, JR., AND MARIE WREN, MINORS, BY THEIR GUARDIAN AD LITEM, L. F. THOMAS, APPELLANTS, v. THOMAS DIXON, RESPONDENT.

[161 Pac. 722; 167 Pac. 324]

1. CONSTITUTIONAL LAW—CONSTRUCTION—SELF-EXECUTING PROVISIONS.

Const. art. 10, sec. 1, as amended in November, 1902 (Stats. 1901, p. 136), declared that the legislature should provide a uniform and equal rate of assessment and taxation to secure a just valuation of real and personal property, mining claims, etc., and that the acreage of patented claims should be assessed at the valuation of \$10 per acre. Stats. 1905, c. 58, provided for the assessment of patented mines at such valuation. Article 10, sec. 1, as amended in 1906 (Stats. 1907, p. 501), provided that patented mining claims should be assessed at not less than \$500, except when \$100 in labor has been actually performed on such mine during the year, in addition to the tax on the net proceeds, and no legislation was passed pursuant to such provision until 1913. *Held*, that the constitutional amendment of 1906 was self-executing at least as to the provision for taxation of patented mines, and absolutely nullified the statute of 1905, so that an assessment thereunder in 1909 was invalid.

2. CONSTITUTIONAL LAW—CONSTRUCTION—REPEAL OF STATUTES.

Statutes may be nullified, in so far as future operation is concerned, by a constitution as well as by statute, as the constitution is the direct, positive, and limiting voice of the people, and may establish a policy, fix a limit to legislation on a given subject, or prohibit specified acts as being performed by public servants.

3. CONSTITUTIONAL LAW—CONSTRUCTION.

The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it, which intent is to be found in the instrument itself, as it is to be presumed that language has been employed with sufficient precision to convey it, and, unless it appears that the presumption does not hold in the particular case, nothing will remain but to enforce it.

4. TAXATION—MINES AND MINERALS—CONSTITUTIONAL PROVISIONS.

Under Const. art. 10, sec. 1, as amended in 1906 (Stats. 1907, p. 501), to provide that, as to unpatented mines and mining claims, the proceeds alone should be assessed and taxed, and that patented claims shall be assessed at not less than \$500, except when \$100 in labor has been actually performed thereon during the year, in addition to the tax upon the net proceeds, a patented mine cannot be assessed at less than \$500 if no labor

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has been performed, and a patented mine on which labor has been performed is exempt from taxation except on the proceeds thereof, and, in the absence of any saving clause, an assessment at \$10 per acre under Stats. 1905, c. 58, pursuant to article 10, section 1, prior to the amendment of 1906 was invalid.

5. CONSTITUTIONAL LAW—SELF-EXECUTING PROVISIONS.

Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void, and no legislation is required to execute such provision; but they are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law.

6. CONSTITUTIONAL LAW—SELF-EXECUTING PROVISIONS—CONSTRUCTION.

In determining when a constitutional provision is self-executing, there is a distinction between a declarative limitation of legislative power on a given subject, within which legislation may or should be enacted, and positive constitutional inhibition which no legislative act can relieve or modify; the former might require future legislation; the latter must, from its nature, be self-executing.

7. TAXATION—ASSESSMENT—TAX SALE—VALIDITY.

Where an assessment on a patented mining claim at \$10 per acre under Stats. 1905, c. 58, expressly following Const. art. 10, sec. 1, as amended in 1902 (Stats. 1901, p. 136), was void under the amendment of that section in 1906 (Stats. 1907, p. 501), providing for an assessment of such claims at \$500, with certain exceptions as to labor performed, etc., the tax sale under the assessment was void.

8. LIMITATION OF ACTIONS—TAX TITLE—ACTION TO DETERMINE—STATUTES.

Rev. Laws, 4946, provides that civil actions can only be commenced within the periods prescribed in the act, after the cause of action has accrued, except where different limitation is prescribed by statute. Section 4951 provides that no action to recover a mining claim shall be maintained unless plaintiff was seized or possessed thereof within two years before the commencement of such action, defining occupation and adverse possession, and extending the provisions of the act applicable to other real estate to mining claims, provided that in such application "two years" shall be intended when "five years" is used, and section 4952 provides that no cause of action to recover real property shall be effectual, unless the person prosecuting the action was seized or possessed of the premises within "five years" before action was commenced, and section 4966 provides that, if one entitled to commence an action to recover real property shall be a minor, the time of disability is no part of the time limited for the commencement of such actions, which may be commenced within two years after the removal of disability. *Held* that, by interpolation, section 4951 was to be

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read as if providing that, if a person to whom an action to recover a mining claim accrues is a minor, the period of disability shall not be part of the time limited for the commencement of such action, which may be commenced within two years after the disability ceases.

9. LIMITATION OF ACTIONS—STATUTES—CONSTRUCTION.

The statute of limitations, like any other statute, is to be construed according to the manifest intention of the legislature, and, in ascertaining such intention, the language used should be construed, if possible, according to the usual meaning of the words used.

10. DESCENT AND DISTRIBUTION—WILLS—TITLE—TIME OF VESTING.

Under the statutory provisions and procedure relative to the estates of decedents, the title to real estate vests in the heirs and devisees at the moment of the death of the testator or intestate, subject only to the right of possession of the executor or administrator under Rev. Laws, 5950, for the payment of the debts and expenses of administration, with the right in the administrator to possession until the estate is settled or delivered over to the parties entitled by the order of the probate court.

11. LIMITATION OF ACTIONS—BAR AGAINST TRUSTEE—RIGHT OF CESTUI QUE TRUST.

Whenever a right of action in a trustee with the legal title is barred by limitations, the right of the *cestui que* trust is also barred, but, if the legal title in the *cestui que* trust, the statute of limitations which might run against the trustee will not constitute a bar against the *cestui* if he be under disability.

12. DESCENT AND DISTRIBUTION—RIGHT OF HEIRS—ESTATE IN ADMINISTRATION.

Where an administrator or executor has been appointed, and the estate is in the course of probate, it is the right of the heirs to maintain an action as against third persons for the possession of the realty.

13. LIMITATION OF ACTIONS—PERSONAL REPRESENTATIVE—STATUTE.

Under Rev. Laws, 5911, providing that every person to whom letters testamentary or of administration shall have issued shall execute a bond with a penalty not less than the value of the personal property, including rents and profits, and may be required to give an additional bond whenever the sale of realty is ordered, the relationship of trustee and *cestui que* trust between the executor or administrators and the heirs is not created in so far as the same might apply to the realty of an estate, so that the rule that a statute of limitations running against a trustee holding the legal title to realty runs also against the *cestui* does not apply.

14. MINES AND MINERALS—RECOVERY OF MINING CLAIMS—STATUTES.

Under Act of Congress July 26, 1866, c. 262, 14 Stat. 252, providing for the patenting of mining claims, Rev. Laws, sec. 4951, providing that no action to recover mining claims shall be

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maintained unless plaintiff or those under whom he claims was seized or possessed of such claim within two years before the commencement of such action, and section 4952, providing that no cause of action upon title to real property shall be effectual unless the person prosecuting the action was seized or possessed of the premises in question within five years before the commission of the act in respect to which the action is prosecuted, and section 4953, referring to mining claims as such, enacted subsequent to the federal statute, applied to patented as well as unpatented mining claims, and an action to recover a patented claim must be commenced within two years from the time when plaintiff was seized or possessed of such claim.

15. LIMITATION OF ACTIONS—MINING CLAIM—NOTICE—INFERENCE.

Minor heirs of one who had duly patented mining claim were entitled to notice of the hostile character of defendant's possession, which notice could not be given them until they were capable in law of receiving it: so that, under the statute (Rev. Laws, 4951, *et seq.*) they might commence an action to recover it within two years after majority, when they were chargeable with notice.

ON PETITION FOR WRIT OF ERROR TO UNITED STATES SUPREME COURT**1. COURTS—FEDERAL SUPREME COURT—REVIEW OF STATE COURT—FEDERAL QUESTION.**

To suggest or set up a federal question for the first time in a petition for rehearing in the highest court of the state is not in time.

2. COURTS—REVIEW BY FEDERAL SUPREME COURT—FEDERAL QUESTION.

In an action to quiet title to a mining claim and mill site claimed under a United States patent duly recorded, where the agreed statement of facts asserted defendant's adverse possession under a certificate of tax sale, and precluded the idea of plaintiff's possession, the court's assertion that plaintiff had never taken possession was within the record, especially where the judgment for defendant did not turn upon such assertion, and a petition for a writ of error to the United States Supreme Court on the ground that the court's opinion raised a federal question would be denied.

APPEAL from Third Judicial District Court, Eureka County; *Peter Breen*, Judge.

Action to quiet title by Mary Wren, administratrix of the estate of Thomas Wren, deceased, and by Mary Wren, individually, and Thomas Wren, Jr., and Marie Wren, minors, by their guardian *ad litem*, L. F. Thomas, against Thomas Dixon. Judgment for defendant, and plaintiffs appeal. **Affirmed** as to appellant Mary Wren, and **reversed** as to appellants Thomas Wren, Jr., and

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Marie Wren, and judgment ordered to be entered in accordance with the prayer of their complaint to the extent of their interest as heirs of Thomas Wren, deceased.

Petition for writ of error to the Supreme Court of the United States denied.

STATEMENT OF FACTS

Thomas Wren died on the 8th day of February, 1904, leaving a widow and two minor children. At the time of his death he was the owner in fee simple of a mining claim and mill site situated in the Mount Hope mining district, Eureka County, Nevada, known as the Good Hope mining claim and mill site. Title to this property was in the said Thomas Wren, deceased, at the time of his death, by United States patent issued to him by the government and bearing date of February 16, 1886. This patent was duly recorded in the recorder's office in the county of Eureka on the 2d day of February, 1911.

Upon the death of the said Thomas Wren, his last will and testament was duly admitted to probate in the district court of the Second judicial district in and for Washoe County; and on the 18th day of March, 1904, Mary Wren, widow of the deceased, was duly appointed and qualified as administratrix of the said last will and testament, and ever since the last-named date she has been and is now the duly appointed, qualified, and acting administratrix of said estate, which said estate has never been closed, and the same is now pending in the district court.

In 1909 the assessor of Eureka County assessed the Good Hope mining claim and mill site to the estate of Thomas Wren, deceased, at the rate of \$10 per acre, under the statutes of Nevada as enacted by the session of the legislature of 1905. The amount of taxes accruing thereon and payable to the county by reason of such assessment was \$11.85. It is admitted that the administratrix of the estate of Thomas Wren, deceased, failed and neglected to pay the taxes levied under the assess-

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ment, and thereupon the treasurer and ex officio tax receiver of the county of Eureka advertised the property as delinquent in the payment of taxes, and later sold the property to defendant here, Thomas Dixon, who paid the tax and costs and expenses thereof and received from the tax receiver a certificate of sale. It is admitted that during the period of redemption after the issuance of the certificates of sale neither the administratrix of the estate of Thomas Wren, deceased, nor any person acting for or in behalf of the minor heirs of said estate, redeemed the property.

On the 20th day of July, 1910, the county of Eureka made and executed and delivered to Thomas Dixon, the defendant here, its tax deed for the patented mine known as the Good Hope mining claim and mill site, property of Thomas Wren, deceased, and a part of his estate.

It is admitted that in so far as the tax sale and proceedings thereunder were concerned, such were regular except as they may have been affected by the constitutional amendment of 1906.

Immediately after the receipt by the said Thomas Dixon, defendant herein, of the certificate of sale of the Good Hope mining claim and mill site in the year 1909, he entered into possession of the patented mine and mill site; and it is admitted that he has remained in actual, continued, open, notorious, and exclusive possession thereof, claiming the same adverse to all persons, said entry and possession dating from the month of January, 1910.

It is admitted that during the years 1910, 1911, 1912, and 1914 the county assessor assessed this property, consisting of a patented mining claim and mill site to the defendant herein in the manner provided by law, and that the defendant paid all the taxes so levied and assessed against this property for the years 1910, 1911, 1912, and 1914, to the county treasurer of Eureka County.

It is admitted that Mary Wren, administratrix of the

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estate of Thomas Wren, Thomas Wren, Jr., and Marie Wren are the heirs at law of the said Thomas Wren, deceased, and that the said Marie Wren and Thomas Wren, Jr., were at the time of the death of Thomas Wren, and were at the time of the commencement of this action, minors.

This action was commenced in the district court of the Third judicial district in and for the county of Eureka on July 3, 1914, by Mary Wren, as administratrix of the estate of Thomas Wren, deceased, and also by Mary Wren in her individual capacity, and by Thomas Wren, Jr., and Marie Wren, minors, by and through their guardian *ad litem*, L. F. Thomas. The action was one to quiet title in the plaintiffs. The case was submitted to the trial court on an agreed statement of facts. Judgment being rendered for the defendant quieting title to the property in him, appeal is taken to this court from that judgment.

Section 1 of article 10 of the constitution was originally, and prior to 1902, as follows:

"The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall provide such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes."

At the legislative session of 1899, and on March 3 of that year, an amendment to this section of the constitution was proposed and passed (Stats. 1899, p. 139), and on March 6, 1901, the same was again passed by the legislature (Stats. 1901, p. 136); and at the general election in November, 1902, it was approved by the people. This amendment to section 1 of article 10 was as follows:

"But the acreage of patented mining claims shall also be assessed at a valuation of \$10 per acre."

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The legislature of 1905 passed an act, section 1 of which provides:

"It is hereby made the duty of the assessors in the various counties of the state to place upon the assessment rolls of their respective counties all patented mines situated within such counties, which mines shall be assessed for taxation at the valuation placed upon them by section 1 of article 10 of the constitution of the State of Nevada, as amended by resolution proposed and passed at the nineteenth session of the Nevada Legislature, March 3, 1899, agreed to and passed at the twentieth session, March 6, 1901, and approved by vote of the people at the general election in November, 1902." (Stats. 1905, p. 81.)

In the year 1903 (Stats. 1903, p. 289) the legislature of this state proposed and passed a constitutional amendment to section 1 of article 10, and in March, 1905 (Stats. 1905, p. 327), this amendment was again passed by the legislature, and at the general election of 1906 it was ratified by the vote of the people. Section 1 of article 10 of the constitution (Rev. Laws, 352), as thus amended by popular vote at the election of 1906, reads as follows:

"SECTION 1. The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed, and, when patented, each patented mine shall be assessed at not less than five hundred dollars (\$500) except when one hundred dollars (\$100) in labor has been actually performed on such patented mine during the year, in addition to the tax upon the net proceeds; and, also excepting such property as may be exempted by law for municipal, educational, literary, scientific, or other charitable purposes."

No legislation was passed pursuant to this new constitutional provision until 1913.

Argument for Appellants

Sweeney & Morehouse, for Appellants:

All authorities are to the point that a void tax deed does not constitute an adverse possession when possession is taken under it, nor set the statute of limitations in motion. This court cannot, therefore, do otherwise than reverse the judgment; and, as the case is submitted on an agreed statement of facts, there is no cause to be tried in the lower court, and there should be an order and decree for the plaintiffs.

The certificate of sale and deed made to the defendant were and are absolutely void, for the reason that the constitutional amendment authorizing the assessment of patented mines at the rate of \$10 per acre was repealed by the amendment adopted by the legislature and ratified by the people in 1906, now known as article 10 of the constitution of the State of Nevada, fixing the assessment of patented mines at not less than \$500, except when \$100 worth of labor has been performed during the assessment year upon such mine, and as this assessment was made by the assessor of Eureka County in 1909 at the rate of \$10 per acre, it was an absolutely void assessment. The present constitutional amendment repealed absolutely the old constitutional amendment and all laws thereunder, and therefore there were no taxes levied or assessed against the property in controversy in 1909; and all subsequent assessments not being made against the estate of Thomas Wren, or the heirs of Thomas Wren, they are likewise void, and therefore the defendant acquired no right or title to the property in dispute by reason of the assessment made by the assessor of Eureka County.

Under the provisions of section 3667, Revised Laws, minors have a right of redemption any time within six months after their disability is removed, and therefore no statute of limitations can run against them by reason of a sale until six months after they become of age. In this case, no suit was brought for the recovery of the taxes, and no process served upon the executrix, mother, father, or guardian of the minors.

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Where the legal title vests in persons who are under disability, or who cannot enter into the possession of the property, the statute of limitations cannot run or commence to run until the disability is removed or the right of entry given. (*Collins v. McCarthy*, 68 Tex. 150; *Grimsby v. Hudness*, 76 Ga. 378; *McQuitty v. Wilheit*, 117 S. W. 730.) If the title is in the heirs and not in the administrators, the minors would have two years after they became of age in which to bring an action for the recovery of the property, and no statute of limitations would run against them in the meantime. (*Learned v. Ogden*, 32 S. W. 278; *Frost v. Eastern Railroad*, 64 N. H. 220; *Mayer v. Kornejey*, 50 South. 880; *Colton v. Onderdonk*, 69 Cal. 159; *Crosby v. Dowd*, 61 Cal. 557.)

Under our law, while an estate of real property is in probate, there is no right of entry in the heirs until distribution; and they being minors or even adults, and as they do, under our law, own the legal title, they have no right of entry until distribution, and the minors have no right of action until they are of age. Therefore no statute could run against minors, during their disability, nor against the widow until she has a right of entry, the rule being that the statute of limitations does not commence to run until there is a right of entry. (*Jackson v. Johnson*, 15 Am. Dec. 433; *McCarthy v. King's Heirs*, 39 Am. Dec. 165; *Osborn v. Hopkins*, 117 Pac. 519; *Stephenson v. Van Balken*, 118 Pac. 1027.)

For the purpose of taxation, a "mining claim" does not include a patented mine. (*Salisbury v. Land*, 63 Pac. 383; *Walter v. Hughes*, 11 Pac. 122.) In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification." (36 Cyc. 1114.) "The rule is cardinal and universal that if a law is plain and unambiguous there is no room for construction or interpretation." (*Brown v. Davis*, 1 Nev. 409; *State v. Washoe County*, 6 Nev. 104; *Ex Parte Rickey*, 100 Pac. 134; *Ex Parte McCoy*, 101 Pac. 419.) The words "mining claims" refer only

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to locations and possessory rights, the reason being that the "mining claim" precedes the issuance of the patent. The patent is based upon the mining claim, and not the mining claim upon the patent. (*Round Mountain v. Round Mountain Sphinx*, 36 Nev. 543.)

"Where two legislative acts are repugnant to or in conflict with each other, the one last passed must govern, although it contains no repealing clause." (36 Cyc. 1073.) Such being the rule as to statutes, it certainly applies, and with greater force, to an organic act of the people at an election. "When an act is repugnant to a prior act, it repeals the prior act, without any repealing clause." (*State v. Burt*, 43 Cal. 560; *Pierpont v. Crouch*, 10 Cal. 315; *People v. Sargent*, 44 Cal. 430; *Baca v. Board*, 62 Pac. 979; *Baum v. Sweeney*, 32 Pac. 778.) "In interpreting the meaning of the language of a constitution we adopt the same rule which obtains in interpreting statutes." (*Oakland v. Hilton*, 69 Cal. 491.) Such being the case, it must be apparent that when the people adopted the amendment of 1906 they intended that patented mines should be assessed in no other way than at not less than \$500, and purposely repealed previous provisions giving the power to assess at \$10 per acre.

"In the absence of a saving clause, the adoption of a new constitution or the amendment of an old operates to supersede and revoke all previous inconsistent and irreconcilable constitutional or statutory provisions and rights exercisable thereunder, at least so far as their future operation is concerned." (Ency. U. S. Sup. Ct., vol. 4, p. 71.) "If a statute is repealed without a saving clause, the effect is to obliterate it as completely as though it had never been enacted." (*Bell v. Talman*, 67 Pac. 339; *Anderson v. Byrnes*, 54 Pac. 821; *Mahony v. State*, 12 Md. 322; *Wall v. State*, 18 Tex. 882; *Sinking Fund Com. v. George*, 47 S. W. 779; *Thorne v. San Francisco*, 4 Cal. 165; *Gilleland v. Schnyder*, 9 Kan. 569; *McMain v. Bliss*, 31 Cal. 122.)

If an assessment is made without any law authoriz-

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ing it, is such an assessment any assessment at all, and is a case under it any sale? Tax proceedings are *in invitum*, and to be valid must be *stricti juris*. (Cooley, Taxation, 259; *Moss v. Sheave*, 23 Cal. 46; *People v. Mahoney*, 55 Cal. 288; *Lake Co. v. M. Co.*, 66 Cal. 20; *Knowlton v. Moore*, 85 N. E. 160.) Failure to comply with the statutory requirements, even in minute particulars, is fatal to the sale. (*Charland v. Home*, 134 Am. St. Rep. 696.) If substantial requirements are not complied with, the sale is void. (*Brown v. Wright*, 17 V. C. 97; *Scales v. Alirs*, 12 Ala. 617; *DeWitt v. Hays*, 2 Cal. 463.) One who claims title to land under a sale must affirmatively show that the law was strictly complied with. (*Blakemoire v. Cooper*, 125 Am. St. Rep. 574; *Ayers v. Lunol*, 124 Am. St. Rep. 1046.) The assessment being void, all subsequent proceedings and the deed thereunder are likewise void. (*Wright v. Fox*, 89 Pac. 832; *Grotefend v. Ultz*, 53 Cal. 666; *Kelsey v. Abbott*, 13 Cal. 609; *Smith v. Davis*, 30 Cal. 536; *Greenwood v. Adams*, 21 Pac. 1134; *Dranga v. Rowe*, 59 Pac. 944.)

"Possession under a tax sale certificate is, during the period of redemption, an admission that the possession is subject to the owner's right of redemption that is not adverse to the true owner." (*Pease v. Lawson*, 33 Mo. 35; *McKeighan v. Hopkins*, 15 N. W. 711; *Bowman v. Wettig*, 39 Ind. 416; *Hulsman v. Deal*, 108 Pac. 849; *Burdick v. Kimball*, 101 Pac. 845; *Kingston v. Ewart*, 116 Pac. 495.) "A purchaser at a tax sale has no title until the time for redemption has expired." (*Harter v. Com.*, 115 Pac. 1070.) No tender of the taxes or of the money paid need be made. (Rev. Laws, 5514; *Dranga v. Rowe*, 59 Pac. 944; *McLaughlin v. Bonyng*, 114 Pac. 798; *Cohen v. Anderson*, 135 Pac. 1096.)

Chas. B. Henderson, Carey Van Fleet, and E. E. Caine,
for Respondent: •

This action cannot be maintained, for the reason that the assessment upon which defendant's deed passed was

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a good assessment at the time it was made, our present section of the constitution not being self-executing, and there being no law to enforce it until 1913; and for the further reason that this action is barred by section 4951, Revised Laws, which has been the law during all of the period covered by the facts.

Section 1, article 10, of the constitution, as amended in 1906, is self-executing to the extent that the legislature cannot assess patented mines at less than \$500, but it is not self-executing to the extent that the assessment of patented mines must be carried out by further legislation. (*Ewing v. Oroville Mining Co.*, 56 Cal. 655; *Griffin v. Rhoton*, 107 S. W. 381; *French v. Teschemaker*, 24 Cal. 539; *Southern Express Co. v. Patterson*, 123 S. W. 353; *Marshall v. Sherman*, 51 Am. St. Rep. 656; *Willis v. Mabon*, 31 Am. St. Rep. 629; *Model Heating Co. v. Magarity*, 81 Atl. 397.)

The section with which we are dealing intends only to lay down certain principles with regard to uniformity of taxation of all property, including patented mines, laying a limitation upon the power of the legislature with regard to patented mines, but this being in and of itself not a method of procedure for the assessment of patented mines. "Where a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down certain general principles as to the enactment of laws upon a certain subject, or for the incorporation of cities of certain populations, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution." (*Davis v. Burke*, 179 U. S. 399, 45 L. Ed. 251; *Stephens v. Benson*, 91 Pac. 577; *Acme Dairy Co. v. City of Astoria*, 90 Pac. 193; *State v. Jones*, 137 Pac. 554; *Kelsey v. District Court*, 139 Pac. 433; *Older v. Supreme Court*, 109 Pac. 478; *Town of Lyons v. City of Longmont*, 129 Pac. 198; *Lanigan v. Town of Gallup*, 131 Pac. 997; *St. Louis Ry. Co. v. Fire Association*, 28 L. R. A. 23.)

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The statute of limitations, in cases like the present, runs during minority of the party affected. Whenever the right of action in the trustee is barred by the statute of limitations, the right of the *cestui que* trust is thus also barred. (*Meeks v. Olpherts*, 100 U. S. 564, 25 L. Ed. 735.) The administrator with regard to the heirs stands in the relation of trustee and *cestui que* trust. (*Harland v. Peck*, 33 Cal. 515.) Upon the death of a testator, a right of action vests in the executor, and if he is barred by the statute, so is the heir, although a minor when the cause of action accrued. (*Jenkins v. Jensen*, 66 Pac. 773; *McLeran v. Benton*, 73 Cal. 329; *Dennis v. Bint*, 122 Cal. 40, 54 Pac. 378; *Stapples v. Connor*, 79 Cal. 15, 21 Pac. 380; *Patchett v. Railway Co.*, 100 Cal. 505, 35 Pac. 73; *Lloyd v. Ball*, 77 Fed. 365; *Snyder v. Saober*, 56 N. J. L. 20, 27 Atl. 1013.) Where a trustee holds the legal title to real estate, which is barred by the statute of limitations, the equitable interests dependent upon it will also be defeated, notwithstanding that the *cestui que* trust is an infant. (*Wilson v. Louisville Trust Co.*, 44 S. W. 121.)

The real property follows the personal property in the hands of the executor or administrator, and he bears the same relationship to the real property as he does to the personal property. (*Griffith v. James*, 155 Pac. 251; *Bishop v. Locke*, 158 Pac. 997; *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086; *Gearfield v. Bridges*, 75 Fed. 47; *Webb v. Winter*, 67 Pac. 691; *Matthews v. Dunkee*, 16 South. 413; *Partee v. Thomas*, 11 Fed. 778; *Nash v. Simpson*, 78 Me. 153, 3 Atl. 58; *Taft v. Decker*, 182 Mass. 110, 65 N. E. 508.)

There is no claim that the tax deed herein is void upon its face. In fact, if it is invalid at all, it is voidable and not void; voidable by reason of the question of the constitutionality of the statute under which it was issued. A void deed on its face may give color of title as effectually as though the deed were regular on its face and void for reason *dehors* the instrument. This is especially true where the effects are such as only a person of legal

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learning and experience could by critical examination discover. (2 C. J., secs. 336-338, 362-364.)

By the Court, MCCARRAN, J. (after stating the facts) :

As we view the case at bar, it presents two questions of primary importance: First, in view of the provisions of section 1 of article 10 of the constitution of this state as amended in 1906 (Stats. 1907, p. 501), was the assessment made in 1909 by the assessor of Eureka County of \$10 per acre on the patented mining claim of Thomas Wren, deceased, a valid assessment, and incidental to this, were the certificate of sale and deed made to the defendant Dixon valid instruments? Second, is the action barred by the statute of limitations? We shall approach these questions in the order stated.

1, 2. At the outset, let us bear in mind that it was not until after the constitutional amendment of 1902 that mining claims were at all assessable in this state. The amendment to the constitution adopted that year provided for the assessment of patented mining claims at a valuation of \$10 per acre. Pursuant to that particular amendment, and only pursuant thereto, the legislature of 1905 (Stats. 1905, p. 81) passed the act authorizing assessors to assess patented mines; and the statute in that respect points for its authority directly and specifically to the constitutional amendment adopted at the general election held on November 4, 1902. This statute took its constitutional authority and its operative vitality, so to speak, directly from the constitutional amendment providing for the assessment of patented mines at a flat valuation of \$10 per acre.

It will be unnecessary for us to comment on or even conjecture as to the reasons that impelled the legislature of 1903 to take the initial step in setting aside this particular amendment to section 1 of article 10 of the constitution; suffice it to say that it passed another amendment to that section and article of the constitution, which at its adoption at the general election of

1906 struck completely, nullified, and set aside this former provision.

Section 1 of article 10 of the constitution (Rev. Laws, 352) after its adoption in 1906 provided:

"The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property real, personal, and possessory, except mines and mining claims, *when not patented*, the proceeds alone of which shall be assessed and taxed, *and when patented, each patented mine shall be assessed at not less than five hundred dollars (\$500) except when one hundred dollars (\$100) in labor has been actually performed on such patented mine during the year* [we italicize], in addition to the tax upon the net proceeds; and also exempting such property as may be exempted by law for municipal, educational, literary, scientific or other charitable purposes."

It must be remembered that the assessment made by the assessor of Eureka County upon which taxes became delinquent and by reason of which certificate of sale and tax deed were ultimately issued to respondent was in 1909, some three years after the adoption of that amendment to section 1 of article 10 of the constitution last quoted. It is the contention of respondent here that inasmuch as no statute was enacted carrying out the provisions of this constitutional amendment until 1913, four years after the assessment of 1909, therefore the statute of 1905, enacted under the provisions of the former constitutional amendment providing for the assessment of patented mines on the basis of \$10 per acre, was in full force and effect in 1909; and they support this contention by the assertion that the constitutional amendment of 1906, fixing the assessment of patented mines at not less than \$500, was not self-executing and required some statute similar to that of 1913 to put the principle in operation.

Assuming the correctness of respondent's position as

to the operative effect of the constitutional amendment of 1906, which question we deem unnecessary for determination, it does not to our mind strengthen their position as supporting the validity of the assessment made under the statute of 1905. It will not be contended that the statute of 1905 would have been operative or effective for any purpose under the constitution of this state before the adoption of the constitutional amendment of 1903. The statute of 1905 could only be effective under the authority of the amendment to the constitution of date last named. Moreover, the peculiar wording and phraseology of the statute of 1905 is not to be overlooked. This statute does not attempt in itself to direct by specific language the assessment of patented mines on the basis of \$10 per acre. On the other hand, it studiously avoided such language and pointed directly to a section and an article of the constitution, naming the date of its adoption, as being the law upon which and by reason of which the statute itself would be mandatory on the several assessors requiring them to assess: "At the valuation placed upon them [patented mines] by section 1 of article 10 of the constitution of the State of Nevada as amended, etc." Did this statute have operative vitality? Was it in force and effect after the section of the constitution upon which it rested for that vitality was by popular will abrogated and a new and irreconcilable policy thereby set up in its stead? Whatever might be said as to the force and effect of this statute up to the time of the adoption of the amendment of 1906, we are unable to find a rule that would give it operative force in the absence of a saving clause in the newly adopted constitutional provision or in some other clause of the constitution itself some three years after the adoption of the new constitutional provision, which was in itself inconsistent and irreconcilable with that statute.

Our position in this respect, based upon the doctrine as we find it established, may be bluntly expressed thus:

The constitutional amendment of 1906, fixing a minimum valuation of \$500 upon patented mines, absolutely nullified the statute of 1905, which, taking its authority from an abrogated constitutional amendment, fixed the valuation at the arbitrary figure of \$10 per acre.

Statutes may be nullified, in so far as their future operation is concerned, by a constitution as well as by statute. (*Cass v. Dillon*, 2 Ohio St. 608.) Indeed, it would be strange if it were otherwise. The constitution is the direct, positive, and limiting voice of the people. It may establish a policy, fix a limit to legislation on a given subject, or prohibit specified acts as being performed by public servants. As said by Mr. Justice Thornton, in the case of *Oakland Paving Co. v. Hilton*:

"In fact it is the solemn declaration of the paramount organic law operating on all departments of the government, expressed in the clearest and strongest language of prohibition. No act can be done by any department contrary to its provisions. It is a law absolutely controlling the legislative, executive, and judicial departments of the government. It takes effect on laws already passed as well as to those to be enacted in the future." (*Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3.)

Our position here is based upon the doctrine which we find eminently supported by authority, to the effect that in the absence of a saving clause the adoption of a new constitution or the amendment of an old constitution operates to supersede and revoke all previous inconsistent, and irreconcilable constitutional and statutory provisions and rights exercised thereunder, at least so far as their future operation is concerned. (6 R. C. L.)

The Supreme Court of the United States, in dealing with the question of the effect of federal constitutional amendments on the existing constitutions and statutes of the several states, speaking through Mr. Justice Harlan, in the case of *Neal v. State of Delaware*, 103 U. S. 370, 26 L. Ed. 567, held, in substance, that the legal

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effect of the adoption of amendments to the federal constitution and the laws passed for their enforcement was to annul so much of the state constitution as was inconsistent therewith.

The State of Pennsylvania, in adopting a new constitution, incorporated the provision that all preexisting laws not inconsistent with itself should continue in force. Prior to the adoption of this constitution, and prior to the establishment or ratification of the federal constitution, the State of Pennsylvania had a constitutional provision prescribing the requisites for the establishment of citizenship. The new constitution of Pennsylvania, passed after the act of Congress of 1799, is entirely silent on the subject of citizenship, save and except as it retained, by specific provision, preexisting laws not inconsistent with itself. In the case of *United States v. Villato*, 2 Dall. 370, 1 L. Ed. 419, the matter before the United States Circuit Court for the District of Pennsylvania turned upon the question whether the prisoner indicted for treason had become a citizen of the United States in consequence of the oath taken and subscribed by him on the 11th day of May, 1793, under the provisions of the former laws and constitution of Pennsylvania. The question was decided on the existence or nonexistence of the former law of citizenship of that state after the adoption of the new constitution, which, although it contained the provision that all preexisting laws should continue in force, was silent on the question of citizenship. One of the justices of the circuit court indulged in this language:

"The act of assembly is obviously inconsistent with the existing constitution of the state, and therefore cannot be saved by the general provision of the schedule annexed to it."

Another of the justices applied the same rule in different language, thus:

"The only act of naturalization suggested, depends upon the existence or nonexistence of a law of Pennsylvania; and it is plain that upon the abolition of the old

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constitution of the state, the law became inconsistent with the provisions of the new constitution, and, of course, ceased to exist long before the supposed act of naturalization was performed."

Here was a case in which a given subject, namely, citizenship, was specifically dealt with by a provision of the former constitution of the State of Pennsylvania. At the time of the enactment of the new constitution of that state, what might be termed a saving clause was incorporated therein, which saving clause would seem to keep in force and effect preexisting laws not inconsistent with the new constitution. On the subject of citizenship, however, the new constitution made no mention; it was absolutely silent. The circuit court, in deciding the matter, specifically referred to the fact that the circumstances of the case rendered it unnecessary to inquire into the relative jurisdiction of the state and federal governments on the subject of citizenship, but decided the question rather in the light of the rule asserted in the quotations above set forth, and which by analogy we deem applicable here.

In the case at bar we find a former constitutional provision levying an arbitrary assessment in the way of taxation upon a specific character of property, and under the provisions of that constitution we find a statute enacted, which statute points to that constitutional provision for its operative force and effect. Some years later another constitutional provision is adopted dealing with the same subject as that dealt with in the former. The latter constitutional provision, however, not only nullifies, but absolutely abrogates and sets aside, the former constitutional provision; and under such conditions we are asked to hold in force and effect, without even the pretense of a saving clause, a statute enacted under the former constitutional provision, inconsistent with the latter. But the rule of law interwoven into the best-considered decisions is otherwise, and this rule is so well asserted and by such eminent authority that we cannot hesitate to apply it where, as

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here, it appears so applicable. (6 R. C. L.) Again, referring to the contention that the newly amended section of the constitution was not self-executing, we may say that, even though such contention be conceded, the provision was, however, prohibitory in its character, inasmuch as it negated the idea of the assessment of patented mines on a basis of less than \$500 in valuation.

The principle to be applied here is aptly illustrated in the decision of the Supreme Court of the United States in the case of *Norton v. Board of Commissioners*, 129 U. S. 479, 9 Sup. Ct. 322, 32 L. Ed. 774. The constitution of the State of Tennessee, prior to March 26, 1870, contained this general provision:

"The general assembly shall have power to authorize the several counties and incorporated towns in this state to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation." (Const. 1834-35, art. 2, sec. 29.)

On the 8th day of February, 1870, the assembly of the State of Tennessee enacted a statute, under this provision of the constitution, authorizing the city of Brownsville to issue corporate bonds to the amount of \$200,000 for railroad purposes, and further authorizing the corporate authority of the city of Brownsville to levy annually an assessment upon all the taxable property within the limits of the corporation sufficient to pay the annual interest on the bonds, and also to establish a sinking fund for the ultimate redemption of the bonds. On the 5th day of May, 1870, this constitutional provision of the State of Tennessee was by public vote amended by the addition of other sections, one of which provided:

"But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes

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cast at said election. Nor shall any county, city, or town become a stockholder, with others, in any company, association, or corporation, except upon a like election, and the assent of a like majority."

Another section of the amendment read:

"All laws and ordinances now in force and in use in this state, not inconsistent with this constitution, shall continue in force and use until they shall expire, or be altered or repealed by the legislature."

The question before the Supreme Court of the United States was as to the effect of the constitutional amendment upon the act of the legislature passed prior to the adoption of that amendment. A consideration of the reasoning therein resorted to by the learned Chief Justice of the Supreme Court of the United States, keeping in mind its applicability to the point under consideration here, aids us in making our position more lucid. It was there pointed out, in the opinion written by Mr. Justice Fuller, that the inhibition contained in the constitutional amendment was self-executing as an inhibition, and although it might require a new and additional act of the legislature to put the full force and effect of the constitutional provision into operation, nevertheless the constitutional provision itself negated the idea of the very thing provided for in the former legislative act, and hence prohibited the municipality from proceeding thereunder. The court there laid special emphasis upon the fact that, even though the new constitutional provision in its entirety was not self-executing, the *inhibition* set up by the amendment *was self-executing*. Thus the statute enacted on the 8th day of February, 1870, by the assembly of the State of Tennessee, conferring power, under a former constitutional provision, to a municipality to perform a specific act, although neither amended nor repealed, was made inoperative because the very thing which it authorized the municipality to do was prohibited by the constitutional amendment of May 5 of the same year. The court there refers to the principle laid down in the cases of *Concord v.*

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Portsmouth Savings Bank, 92 U. S. 625, and *Railroad Company v. Falconer*, 103 U. S. 821, and draws attention to the distinction between the operation of a constitutional limitation upon the power of the legislature and of a constitutional inhibition upon the municipality itself. "In the former case," says the court, "past legislative action is not necessarily affected, while in the latter it is annulled. Of course, if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith. * * * But such a provision does not perpetuate any previous law enabling a municipality to do that which it is subsequently forbidden to do by the constitution."

So in the case at bar we say, assuming that parts of the constitutional amendment of 1906 required future legislation to put them in operation, that phase of the constitutional amendment of 1906 which established a minimum valuation to be placed as an assessment against patented mining claims specifically negated the idea of a lesser valuation, and hence prohibited assessment of patented mining claims on the basis of \$10 per acre. This prohibition was immediately self-executing, and required no statute to either emphasize its inhibition or to place it in operation. So the statute of 1905, which provided for an assessment of patented mines on the basis of a lesser valuation than that fixed specifically as a minimum by the constitutional amendment of 1906, although neither repealed nor amended by legislative act until 1913, became a nullity after the adoption of this constitutional amendment, inasmuch as its operation would be in direct contravention to the inhibition established by the amendment. It was undoubtedly the intention of the people of this state, when they adopted this constitutional amendment, to foster and encourage the mining industry of this state and to promote development of mineralized ground; and to that end they declared that patented mines should be exempt where the development or prospect work was

performed thereon, at least to the extent of \$100, and, where no such labor was performed, the patented mine should be assessed for not less than \$500.

3. Mr. Cooley, in his work on Constitutional Limitations, says:

"The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the law-giver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and, unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain but to enforce it." (Cooley, Const. Lim. 6th ed. 69.)

The same principle may be found in application in the cases of *People ex rel. Decatur & State Line Ry. Co. v. McRoberts*, 62 Ill. 38, and *Mitchell v. I. & St. L. R. R. & C. Co.*, 68 Ill. 286.

4. This court in the case of *Goldfield Consolidated Mines Co. v. State*, 35 Nev. 178, 127 Pac. 77, had under consideration the construction and application of section 1 of article 10 of the constitution as amended in 1906, and there held that, where \$100 worth or more of labor has been expended on a patented mining claim during any one year and prior to the time of assessment, the mine is exempt from taxation except on the proceeds thereof.

Following the decision in that case, it may be said that this section of the constitution sets up two distinct negatives, *i. e.*, first, a patented mine cannot be assessed at less than \$500 if the labor has not been performed; second, a patented mine on which the labor has been performed cannot be assessed at either more or less than \$500—"is exempt from taxation except on the proceeds thereof." (*Goldfield Consolidated Mines Co. v. State*, *supra*.)

Counsel for respondent asks the question:

"Does this section of the constitution contain within

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its own terms a complete rule of conduct protecting the right of exemption for \$100 worth of work done upon a patented mining claim?"

We may answer this by saying that in this respect it makes no difference, because, if the labor was performed, assessment for any sum was prohibited; hence the assessment in this case would be void. If labor was not performed, the assessment for a sum less than \$500 was prohibited; hence, the assessment in this case would be void. The case presented here emphasizes the rule that prohibitory provisions in a constitution are usually self-executing.

It is apparent that in either event above referred to a patented mine cannot, under the provisions of this section of the constitution and in the light of the rule of this court in the Goldfield case, *supra*, be assessed for less than \$500. Here was a new provision in the organic law of the state, one that set up a prohibition which in itself required no legislation to execute; one that negatived future legislation as to the matter covered by the prohibition; one that nullified, repealed, and set aside the future efficacy of then existing legislation, provisions of which were in contravention to this prohibition. Here was a constitutional provision which with no uncertainty limited the assessment of patented mines by fixing a minimum less than which no assessment was to be valid. It requires no further citation of authorities than those we have herein set forth to support the proposition that any act which came within the prohibition was void, and any statute which sought to continue a policy expressly prohibited by this constitutional provision, whether enacted prior or subsequent to the adoption of the constitutional amendment, was, in the absence of a saving clause in the constitution itself, nullified. There can be no question, as we view the situation, that the statute of 1905 providing for the assessment of patented mines on a basis which fell within the specific prohibition of the constitutional amendment of 1906 was after the adoption of that

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constitutional amendment nullified, repealed, and set aside as much so as though it had never existed.

5. The rule is stated and supported by authority that prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void. (6 R. C. L. 62; *State ex rel. Delgado v. Romero*, 17 N. M. 81, 124 Pac. 649, Ann. Cas. 1914C; 1114.) This doctrine was applied by the Supreme Court of California in a series of cases arising after the adoption of the new constitution of that state in 1879. The case of *Oakland Paving Co. v. Hilton*, *supra*, presents a question very much like that at bar, and it will be noted that in that case the court held that, when a constitutional provision is prohibitory in its language, no legislation is required to execute such provision; for it is then self-executing.

"Every constitutional provision," says the court, "is self-executing to this extent, that everything done in violation of it is void."

To the same effect we find the cases of *McDonald v. Patterson*, 54 Cal. 245; *Donahue v. Graham*, 61 Cal. 276; *Ewing v. Oroville Min. Co.*, 56 Cal. 649.

Counsel for respondent, in a masterful presentation by way of exhaustive brief, cite us to many eminent authorities relative to the subject at hand: *Griffin v. Rhoton et al.*, 85 Ark. 89, 107 S. W. 380; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; *Southern Express Co. v. Patterson*, 122 Tenn. 279, 123 S. W. 353; *Davis v. Burke*, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249; *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626; *Model Heating Co. v. Magarity*, 12 Boyce (Del.) 459, 81 Atl. 394, L. R. A. 1915B, 665; *French v. Teschemaker*, 24 Cal. 518. These authorities, as well as many others, support one great fundamental principle. This principle is best expressed in the language of Judge Cooley in his work on Constitutional Limitations wherein he says:

"A constitutional provision may be said to be self-

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executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." (Cooley, Const. Lim., 7th ed. 121.)

In the case of *Davis v. Burke*, *supra*, relied upon by counsel, we note the significant language emphasizing the very thing we have heretofore mentioned. There Mr. Justice Brown, speaking for the Supreme Court of the United States, said:

"Where a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution, but where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions."

Here is the line that distinguishes the case at bar. The section of the constitution under consideration prohibits a given act. In that prohibition it "lays down certain general principles; * * * it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions." In short, it is complete within itself to the extent of the prohibition. It is self-executing to the extent that it prohibits the taxation of patented mines for a less sum than \$500.

The Supreme Court of Minnesota, in the case of *Willis v. Mabon*, *supra*, took occasion to make the following observation patent to the matter under consideration:

"A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so

desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void. * * * The question in every case is, whether the language of the constitutional provision is addressed to the courts or the legislature, does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration, both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts."

In the case at bar, a positive prohibition is found whereby the legislative, as well as the executive, branch of the government is bound, whereby the act of taxation of a given class of property is prohibited where such taxation is less than a given sum. Does not this indicate that it was intended as a present enactment complete in itself, as "definitive legislation"—a complete and positive prohibition? Does it contemplate subsequent legislation to carry it into effect? What legislation is necessary to emphasize that which prohibits a given act?

6. In determining when a constitutional provision is self-executing, we would distinguish between declarative constitutional limitation of legislative power on a given subject, within which limitation legislation might or should be enacted, and positive constitutional inhibition, which inhibition no legislative act could relieve or

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modify. The former might require future legislation; the latter must, by reason of its very nature, be self-executing.

But again, respondent contends that inasmuch as it would require legislation to put in operation certain phases of section 1 of article 10 as amended, therefore nothing contained in the section was self-executing. But apply this reasoning to the same section as it was originally written and as it stood before it was amended in 1903; the section then prescribed:

"The legislature shall provide by law for a uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed. * * *"

Here was a constitutional provision which in its entirety, according to respondent's theory, would require legislation to make completely operative. Indeed, legislation was by the very language of the section directed, but did it require any legislation to enforce the inhibitory clause "excepting mines and mining claims, the proceeds of which alone shall be taxed?" Could any amount of legislation more forcibly prohibit the taxing of this class of property? Was not this class of property exempted from taxation by the very language of the section itself? Was not this prohibition self-executing? Manifestly so. Apply this reasoning to the section of the constitution as it now stands, and in which, as we have already shown, in the light of the decision in the Goldfield Consolidated case, there is a specific prohibition under which patented mines are not to be assessed in any event for less than \$500. Could any legislative language make this prohibition more forcible? Was any legislative language necessary to prohibit what the organic law already prohibited?

7. Reasoning as we do as to the force and effect of the statute of 1905 after the adoption of the constitutional amendment of 1906, the assessment made by the assessor of Eureka County of the Good Hope mining

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claim and mill site, being based on a valuation of \$10 per acre was void, inasmuch as an assessment of that character was made in the face of the strict inhibition of the constitution. It follows that, the act of assessment of the claim in the manner in which it was assessed by the authority of Eureka County being void, the sale which followed the delinquency was in itself void.

The statute of 1905 passed pursuant to the former constitutional amendment had been nullified by the constitutional amendment of 1906. It was of no more force and effect than though it had never existed. (*Oakland Paving Co. v. Hilton, supra.*) Hence any assessment made under its provisions or by its authority was as void as the statute itself.

Mr. Cooley, in his work on Taxation, 3d ed. vol. 2, p. 912, in discussing tax sales as being made exclusively under a statutory power, says:

"It is therefore accepted as an axiom, when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings, but special reasons make it peculiarly applicable to the case of tax sales."

If this rule can be stated by the learned authority as being axiomatic with reference to the proceedings after the assessment, how much more so do they apply in a case where the assessment itself is made under a void statute; yea, more, made in the very face of a constitutional prohibition?

To the same effect are the following cases: *McLaughlin v. Thompson*, 55 Ill. 249; *Kemper v. McLelland's Lessee*, 19 Ohio, 308; *Gamble v. Witty*, 55 Miss. 26; *Hardenburgh v. Kidd*, 10 Cal. 402; *Riverside Co. v. Howell*, 113 Ill. 259.

8, 9. Respondent contends, and the trial court decided, that the action was barred by the statute of limitation;

and this constitutes the second, but not the secondary, proposition in the case. We turn first to our statute for answer to this contention, keeping in mind the fact that the property in question was real property, and that the sale was not pursuant to the judgment of any court, but was pursuant to prescribed statutory procedure.

Section 4946, Revised Laws, provides:

“Civil actions can only be commenced within the periods prescribed in this act, after the cause of action shall have accrued, except where a different limitation is prescribed by statute.”

Section 4951, Revised Laws (section 9 of the Civil Practice Act), applicable to actions for recovery of mining claims, cited and relied upon by respondent in support of his contention, is as follows:

“No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof. All the provisions of this act which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; *provided*, that in such application ‘two years’ shall be held to be the period intended whenever the term ‘five years’ is used; *and provided, further*, that when the terms ‘legal title’ or ‘title’ are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim.”

It may be well here to note the words of the statute last quoted, which, if we followed the common and ordinary canons of construction, we cannot declare to be devoid of meaning or to be without the force and effect

conveyed by the words therein taken in their usual and ordinary acceptance:

"All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; *provided*, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used."

With this provision in mind, we turn to those sections of this act which apply to other real estate as regards actions for the recovery thereof; and, without commenting on the significance of its position in the act, it will suffice to say that we find it in the next succeeding section, to wit, section 4952 of the Revised Laws, being section 10 of the act. It prescribes as follows:

"No cause of action, or defense to an action, founded upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within five years before the committing of the act in respect to which said action is prosecuted or defense made."

It will be noted that by the provisions of section 4951 this section is made to apply to actions for the recovery of mining claims; and where the term "five years" is used, two years is to be understood as applicable to the last-named class of property.

We remember that section 4952 prescribes a limitation as to the time within which a cause of action or a defense to an action founded upon the title to real property shall be effectual; and, with this in mind, we inquire, Is there any provision of this act, or any other statute, which establishes an exception to the rule laid down by section 4952 affecting the time for the commencement of actions founded upon title to real property? And in answer to this we find section 4966, which reads as follows:

“If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense, founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either: 1. Within the age of majority; or, 2. Insane; or, 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life—the time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such actions, or the making of such entry or defense, but such action may be commenced or entry or defense made, within the period of two years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced, or entry or defense made, after that period.” (Rev. Laws, 4966.)

This section applies as an exception to the specific provisions of section 4952, wherein the time for the commencement of an action founded upon the title to real property is fixed. The rule established by section 4952, together with its exception as established by section 4966, applies to actions for the recovery of real estate; and the rule established by these two sections is by specific provision made to apply with equal force and effect to section 4951, because by the last-named section it is provided:

“All provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; *provided*, that in such application ‘two years’ shall be held to be the period intended whenever the term ‘five years’ is used.”

Hence, by interpolation, we read section 4951, Revised Laws, as follows:

“No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or for whom he claims, were seized or possessed

of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of the action. * * * If a person entitled to commence an action for the recovery of a mining claim, or for the recovery of the possession thereof, or to make any entry or defense, founded on the title to a mining claim, or to rents or services out of the same, be at the time such title shall first descend or accrue, either: 1. Within the age of majority; or 2. Insane; * * * the time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such actions, or the making of such entry or defense, but such action may be commenced or entry or defense made, within the period of two years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced, or entry or defense made, after that period."

In the case of *Treadway v. Wilder*, 12 Nev. 108, this court held that the statute of limitations, like any other statute, is to be construed according to the manifest intention of the legislature; and in ascertaining such intention the language used should be construed, if possible, according to the usual meaning of the words used.

Under a statute of Oregon, which in all essential particulars was the same as ours, the supreme court of the state, in a case involving the sale of real estate made pursuant to the terms of a father's will, as well as by court decree, held that under such a law an infant had fifteen years after the cause of action accrued in which to prosecute his action to recover real property, unless (as provided for in the Oregon law) he should become of age after ten years had elapsed and before the expiration of five years thereafter, in which case the time for the commencement of the action would be one year after the disability ceased. (*Northrop v. Marquam*, 16 Ore. 173, 18 Pac. 449.)

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To the same effect is the case of *Hulsman v. Deal*, 82 Kan. 518, 108 Pac. 849. In the last-named case the Supreme Court of Kansas, under conditions and statutory provisions somewhat similar to those presented in the matter at bar, supports the position we have taken here; and to the same effect is the case of *Kessinger v. Wilson*, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220. See, also, *Lanning et al. v. Brown*, 84 Ohio St. 385, 95 N. E. 921, Ann. Cas. 1912C, 772, and note.

The appellants in this action, Marie Wren and Thomas Wren, Jr., who appear by their guardian *ad litem*, were within the age of majority at all times and dates affected by this action. Applying to this case the force and effect of the several sections of our civil practice act quoted above, it follows that the statute of limitations has not run against their right of action.

10, 11. It is contended by respondent that inasmuch as the statute of limitations would have run against the administratrix of the estate of Thomas Wren, deceased, therefore the heirs of the said Thomas Wren, although minors during all of the time, were nevertheless directly affected by the same statute.

It has been repeatedly decided by the Supreme Court of California, under statutory provisions and procedure relative to the estates of deceased persons similar to that of ours, that the title to real estate vests in the heirs and devisees at the moment of the death of testator or intestate, subject only to the lien of the executor or administrator for the payment of the debts and expenses of administration, with the right in the administrator to present possession, which continues until the estate is settled or delivered over to the parties entitled by the order of the probate court. (*Beckett v. Selover*, 7 Cal. 215; *Meeks v. Hahn*, 20 Cal. 627; *Estate of Woodworth*, 31 Cal. 595; *Colton v. Onderdonk*, 69 Cal. 158.)

Holding to the same effect are the cases of *Murphy v. Crouse*, 135 Cal. 18, and *Bates v. Howard*, 105 Cal. 183.

The Supreme Court of Colorado, in the case of *Adams v. Slattery*, 85 Pac. 87, held to the effect that the realty

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belonging to the estate of a deceased person descends directly to the heirs of the deceased, subject to the payment of the debts of the deceased, and that the administrator has no title or interest in the real estate except the rents thereof, and then only when it becomes necessary to have recourse to the real estate to pay the debts of the deceased.

Mr. Schouler, in his work on Wills, Executors, and Administrators, says:

“Real estate, at the common law, became vested at once on the death of the owner in his heirs or devisees, and the executor or administrator has as such no inherent power over it. * * * It is only as legislation or the will of a testator may have conferred an express power upon the executor or administrator, that he can exert it in respect of real estate, unless authority has been conferred by the heirs or devisees themselves.” (Schouler on Wills, Executors, and Administrators, 5th ed. vol. 2, p. 1199.)

This court in at least two instances has expressed itself to the same effect (*Price v. Ward*, 25 Nev. 203; *Gossage v. Crown Point Mining Co.*, 14 Nev. 156.)

Following, as it does, as a conclusion to be reached from the application of our statutory provision, in the light of decisions rendered under similar statutory provisions in other states, that the legal title to realty belonging to the estate of one deceased descends directly to his heirs, it follows then, as a matter of course, that the heirs of Thomas Wren, deceased, became at his death vested with the legal title to the Good Hope mining claim and mill site; and whatever may be said as to the statute of limitations running against the interest of Mary Wren, wife of the deceased, she being under no disability, it follows that the right to maintain an action to quiet title to the interest of the minor heirs, Marie Wren and Thomas Wren, Jr., is not barred to them by the statute of limitations.

The Supreme Court of California in the case of *Crosby v. Dowd*, 61 Cal. 557, had the identical question presented

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here under consideration and under similar statutory provision, and the conclusion reached by that court in that instance, as well as the reasoning resorted to in arriving at that conclusion, will be found in support of the position we take here.

The respondent's strongest position, and one which requires most careful scrutiny in determining whether or not it applies to the case at bar, is that set forth in his contention that the administratrix was a trustee, and the minor heirs, Marie Wren and Thomas Wren, Jr., were *cestui que* trustents. Asserting this as the first proposition, they follow it up by a contention, supporting the same by a line of authorities, that whenever the right of action in a trustee is barred by limitation, the right of the *cestui que* trust is also barred, and respondent contends that this rule applies whether or not the *cestui que* trust be laboring under disability during the period of limitation. Many authorities are assigned by the respondent supporting the proposition which he asserts; indeed none more forceful than that contained in the decision of *Meeks v. Vassault*, 3 Sawy. 206, Fed. Cas. No. 9393, affirmed in the decision of the Supreme Court of the United States, *Same v. Olpherts*, 100 U. S. 564, 23 L. Ed. 735. (*Harlan v. Peck*, 33 Cal. 515, 91 Am. Dec. 653; *Jenkins v. Jensen*, 24 Utah, 108, 66 Pac. 773, 91 Am. St. Rep. 783; *Dennis v. Bint*, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17; *Patchett v. Pacific Coast Ry. Co.*, 100 Cal. 505, 35 Pac. 73; *Williamson v. Beardsley*, 137 Fed. 467, 69 C. C. A. 615.) A correct statement of the rule applied by these authorities last referred to emphasizes two principal elements which distinguish the cases relied upon by respondent from that at bar. As a general proposition, we think the rule is that, whenever the right of action in a trustee who is vested with the legal title and competency to sue is barred by limitation, the right of the *cestui que* trust is also barred.

We have already dwelt on the proposition that under a line of authorities rendered in the light of statutes similar to ours, and under the decisions of this court, the

legal title to the real estate of one deceased vests in his heirs. (*Price v. Ward*, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459; *Gossage v. Crown Point Mining Co.*, 14 Nev. 156.) Hence the line to be drawn which would distinguish the case at bar from that line of cases exemplified in the decision of *Meeks v. Olpherts*, 100 U. S. 564, 23 L. Ed. 735, is one which rests primarily upon the question in whom is the legal title. In other words, if the trustee be vested with the legal estate or title, and while so vested is competent to sue, the statute of limitation running against the trustee will also run against the *cestui que* trust, but if the legal title be in the *cestui que* trust, the statute of limitation which might run against the trustee will not constitute a bar against the former if he be under disability during the period of limitation.

In this respect it may be well to note that the case of *Meeks v. Vassault*, *supra*, decided by the Supreme Court of the United States, was a matter arising under a probate sale; and there the court especially dwelt upon the right of action which might be maintained by the heirs of the estate against the bondsmen of the administrator.

In the case of *Harlan v. Peck*, *supra*, referred to in the case of *Meeks v. Vassault*, *supra*, the matter grew out of a probate sale made pursuant to an order of a court of competent jurisdiction and pursuant to statutory provision.

In the case of *Jenkins v. Jensen*, *supra*, the court had under consideration a matter involving trust deeds investing the trustees with the legal title to the realty under the peculiar restrictions set forth in the deed.

In the case of *Dennis v. Bint*, *supra*, the question involved was the sale of real estate by the administrator following an order made by the court having jurisdiction in probate proceedings. The decision there referred approvingly to the case of *Meeks v. Olpherts*, *supra*, and to *McLeran v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814. The decision in the case, as did the decision in the cases therein referred to, turned upon

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the proposition that under the statutes of California the administrator, for the purpose of making the sale under the order of the court in probate proceedings, was the trustee and the heirs were the *cestui que* trustents.

In the case of *Patchett v. Pacific Coast Ry. Co.*, *supra*, the trustee held a legal title by and through a deed.

In the case of *Williamson v. Beardsley*, *supra*, the question of a sale pursuant to an order of a court during probate proceedings was before the court for determination. There, as in the other cases, the title for the purpose of the sale was in the executor, he being the trustee, the heirs being the *cestui que* trustents.

In Wood on Limitations the author cites the rule which we desire to impress by reason of its importance in assisting us to distinguish the matter at bar:

“When the legal title of property is vested in a trustee who can sue for it, and fails to do so within the statutory period, an infant *cestui que* who has only an equitable interest will also be barred; but the rule is otherwise when the legal title is vested in the infant, or cast upon him by operation of law. * * *

Continuing on the subject, the author states that, if the *cestui que* trust was ignorant of the sale and the purchaser knew of the trust, the *cestui que* trust will not be barred. (Wood on Limitations, 2 ed. vol. 2, p. 522, sec. 208.)

Section 5950, Revised Laws, being section 94 of the civil practice act, provides:

“The executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased and may receive the rents and profits of the real estate until the estate shall be settled or until delivered over by order of the district court to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings, and fences thereon which are under his control.”

In the case of *Gossage v. Crown Point Mining Co.*, *supra*, this court, speaking through Mr. Justice Hawley, referred with approval to the decision of the Supreme

Court of Michigan, which, in passing upon a statute similar to ours, held that the right of possession of real property belonging to an estate is in the heir until the executor or administrator takes possession or otherwise claims his right under the statute. (*Streeter v. Paton*, 7 Mich. 341; *Marvin v. Schilling*, 12 Mich. 356; *Champau v. Champau*, 19 Mich. 116.)

Further observing, the court says:

"All the decisions in the respective states, where the question is alluded to, concede the proposition that, in construing this section of the statute, the entire probate system relative to the settlement of the estates of deceased persons, as well as the statute concerning descents and distribution, must be considered. There cannot be any controversy as to the correctness of this general rule. The rights of the relative parties ought always to be considered, and such an interpretation given as would afford the protection intended to be reached by the legislature."

The decision of this court in the case of *Gossage v. Crown Point M. Co.*, *supra*, is decisive of a matter relative to the application of our statute which we deem of vital importance in arriving at a correct conclusion on the matter at bar. This court there approved the reasoning found in the case of *Streeter v. Paton*, *supra*, to the effect:

"The object of this particular section of the statute was to prevent injustice to creditors, and to have the rents as well as the proceeds of the sale of the real estate applied to the payment of debts; * * * the language * * * is not imperative, but gives a right which the administrator or executor may or may not exercise; * * * it is the duty of the personal representative to take possession of the real estate, when it, or the rents and profits, may be needed in the settlement of the estate, but when this is not the case, although he may do so under the statute, it is not imperative on him; * * * there is no valid reason why it should be imperative. * * * The personal estate may be more than ample

for all purposes of administration and years may be required in settling the estate; * * * it would be a harsh construction of the statute that would deprive the heir of his inheritance in the meantime."

Speaking on the question of the right of the heirs to maintain an action in ejectment in their own name, the court said:

"They are the real parties in interest. They alone will be benefited or injured, as the case may be, by the result of the suit. There are no creditors to be affected. No costs or debts of any kind outstanding against the estate. Neither is there any existing equity of any character in favor of the administrator. Moreover, if any legal or equitable right existed in his favor, he has waived the same in favor of the heirs. If any objection, therefore, exists against the right of the heir to maintain this suit, it must be found in the plain language, spirit, and intent of the statute. There is no other reason that could be advanced why the heirs should be compelled to go through the formula and delay of procuring the appointment of a special administrator."

12. Hence we find that in no uncertain terms we have determined not only that the realty in the estate of one deceased vests immediately in his heirs (*Price v. Ward, supra*), but, moreover, that even where an administrator or executor has been appointed, and the estate is in course of probate, it is the right of the heirs to maintain an action as against third persons for the possession of the realty.

In the case of *Meeks v. Olpherts, supra*, the Supreme Court of the United States, in deciding whether or not the statute of limitations would run against an heir under legal disability, looked directly to the decision of the Supreme Court of California in the case of *Harlan & Huff v. Peck*, 33 Cal. 515, and in the light of the decision of the highest court of that state in the last-named case held:

"The disability cannot have reference to a person in whom no right of action exists. * * * The right

of action on the title which the plaintiff now asserts was in the administrator, and the statute therefore ran against him and against all whose rights he represented. 'In all suits for the benefit of the estate he represents both the creditors and the heirs,' said the Supreme Court in *Beckett v. Selover*, 7 Cal. 215."

The highest court of this state, following a line of Michigan cases, has taken a contrary view as to the matter last quoted, and, in construing our statutory provisions in the light of the policy sought to be carried out as made manifest by our legislative enactments, has determined that an action might be maintained by the heirs in their own name where they sought to secure to themselves possession of the realty as against third parties. Hence, the assertion made by the Supreme Court of the United States in the case of *Meeks v. Olpherts*, *supra*, that "the disability cannot have reference to a person in whom no right of action exists," does not apply to minor heirs in a case like the one at bar. Rather do we apply the doctrine laid down by that court in the same opinion, wherein it said:

"The legal disability mentioned in section 191 [Civil Code Cal.] manifestly has reference to a well-known class of persons in whom a right to redress exists, but who for special reasons are incapable of acting for themselves; such as infancy, coverture, and the like. Whatever is a disability under the general statute of limitations is a disability under this statute."

The property in question here had never been taken possession of by the administratrix, if we read the record aright. It was, nevertheless, realty which belonged to the estate of Thomas Wren, deceased; realty which passed directly to his heirs in the event of his death. Two of these heirs were at that time, as well as at the time of the commencement of this action, minors. Had these heirs been laboring under no disability, it would, in the light of the decision of this court in *Gossage v. Crown Point Mining Co.*, *supra*, have been their right and privilege to institute an action in their own name

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to quiet title to the property. But these heirs, Marie Wren and Thomas Wren, Jr., were at the time of their father's death, as well as at the time of the commencement of this action, minors; hence laboring under a legal disability. Had these heirs been free from this disability, they might have instituted this action at any time within two years from and after the date of the tax sale at which this respondent alleges he acquired title to the property in question. But the statute of this state (Rev. Laws, 4951-4966) provides that by reason of this disability this action, which, under the decision of this court in the case of *Gossage v. Crown Point Mining Co.*, *supra*, was theirs, had they been of legal age, may be commenced by them within a period of two years after their disability has ceased.

The cases of *Meeks v. Olpherts* and *Meeks v. Vassault*, *supra*, are earnestly relied upon by respondent in furtherance of his position here. But, in the light of the decision of this court heretofore referred to and in view of our statutory provision, that decision is distinguishable in view of assertions there made and the reasoning resorted to. The court there says:

"Under the statutes of California, real estate, like personalty, is assets in the hands of the administrator, and is to be administered, and applied first to the payment of the expenses of the administration and debts of the deceased, and then the residue, after satisfying all lawful claims, distributed to the heirs. Realty and personalty stand upon the same footing, except that the personalty must be first exhausted before the real estate can be sold and applied to payment of the debts of the deceased. The right of possession, and right of action to recover possession of the real estate, vests exclusively in the administrator. The heirs cannot maintain an action to recover the real estate pending the administration, or after the administration has been commenced, until the estate has been settled, or the real estate has been distributed to them by the probate court." (*Meeks v. Vassault*, 3 Sawy. 212, Fed. Cas. No. 9393.)

Such cannot apply here, in view of the decision of this court in the case of *Gossage v. Crown Point Mining Company, supra*.

Again, in the Meeks-Vassault case the court said:

"The cause of action had accrued, but it was in the administrator, and had not yet passed to the heir. There was, however, a party in existence competent to sue, one to whom the law gives the right, and upon whom it imposes the duty to sue. This party is the administrator who is the trustee of the estate, and who for this purpose represents both the heirs and the creditors of the estate. He represents the title."

Again, we say, this reasoning must fall before the force and effect of the decision of this court in the case of *Gossage v. Crown Point Mining Co., supra*.

But these several lines of reasoning resorted to in the Meeks-Vassault case cannot avail in this case for any reason. The court there, in speaking of the remedy remaining in favor of the heirs, used the following significant language:

"Whether as effective as desirable or not, the heirs are not without a remedy. They have a remedy against the administrator and upon the administrators' bond; and they may, in a proper proceeding, also compel the administrator to sue."

The reasoning and conclusion arrived at in these cases by the Supreme Court of the United States and by the learned Circuit Court of Appeals cannot avail in the case at bar, first, because a conclusion different from that of the Supreme Court of California, referred to in the Olpherts case, has been arrived at by the highest court of this state as to the right of the heirs to maintain an action in their own name, for the possession of realty belonging to the estate, as well as for another reason.

13. Section 5911, Revised Laws, being section 55 of our Civil Practice Act, provides:

"Every person to whom letters testamentary (unless the will otherwise provides) or of administration shall have been directed to issue shall, before receiving the

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letters, execute a bond to the State of Nevada, with two or more sureties to be approved by the district judge. In form the bond shall be joint and several, and the penalty shall not be less than the value of the personal property, including rents and profits belonging to the estate, which value shall be ascertained by the court by the examination on oath of the party applying, and of any other persons the judge may think proper to examine. The district judge shall require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him to be sold. The bond shall be conditioned that the executor or administrator will faithfully execute the duties of the trust according to law, and shall be recorded by the clerk."

It will be noted that in this section the penalty provided for in the bond is fixed at not less than the value of the personal property, including rents and profits belonging to the estate. It is only when the sale of any real estate belonging to the estate is ordered by the district judge that an additional bond is required under this statutory provision. Under the latter condition only, a bond is required from the executor or administrator to insure that he "will faithfully execute the duties of the trust according to law." Hence, as we read this provision of our statute, and viewing it in the light of the general policy which we find established by the legislature applicable to the settlement of the estates of deceased persons, it is made manifest to us that the relationship of trustee and *cestui que* trust between the executor or the administrator and the heirs is not created by our statute in so far as the same might apply to the realty belonging to an estate. For this reason, the rule that would assert that a statute of limitations running against a trustee who holds the legal title to real estate runs also against the *cestui que* trust, does not apply.

The disability which prevented the statute of limitation from running as against the minors, Marie Wren and Thomas Wren, Jr., does not effect the same result as

with reference to Mary Wren in her own right nor to Mary Wren as administratrix. She was laboring under no such disability, and the statute as to the time during which actions might be commenced operates as a bar to her right of action here inasmuch as the period during which such actions could have been commenced has long since passed.

14. Counsel for appellants here contend that the statute of limitations governing the commencement of actions of this character has not run against the appellant, Mary Wren. In this respect they contend that section 4951, Revised Laws, does not apply, inasmuch as the property in question here was a patented mining claim. In this respect they argue that the term "mining claim" as used in section 4951 and in the exception to section 4953, refers to unpatented mining claims; that the time within which to commence an action for the recovery of a patented mining claim is governed by section 4952, Revised Laws, and hence this action might have been commenced at any time within five years from and after the date at which appellant Mary Wren was last seized or possessed of the premises, to wit, December, 1909.

The contention of appellants in this respect might be more serious were it not for the fact that the history of legislation as we find it in this state will scarcely support their position.

The first act of Congress providing for the patenting of a mining claim was passed in the year 1866. (U. S. Stat. L., 1866, p. 262; *Golden v. Murphy*, 31 Nev. 410.)

Section 4951, Revised Laws, was first enacted by our legislature in 1867. (Stats. 1867, p. 85.)

Section 4953, Revised Laws, was first enacted in 1869. (Stats. 1869, p. 95.)

These enactments were carried forward in their original form, by continuation, into our Revised Laws. (Rev. Laws, 5817.)

Each of these provisions of our code refers to mining claims as such, and this notwithstanding the passage of

the federal statute of 1866 providing for the patenting of such property. If the legislatures of 1867 and 1869 had intended that patented mining claims should not be affected by the provisions of this statute, we may assume that some expression to that effect would be found in the statute. Finding none, we must conclude that the legislature, when enacting these provisions, did so with full knowledge of the federal statute of 1866 providing for the patenting of mining claims, and hence intended that the force of these sections should apply to patented as well as unpatented mining claims, and that actions for the recovery of mining claims or for the recovery of the possession thereof must be commenced within two years from the time at which the plaintiff or those through or from whom he claims were seized or possessed of such mining claim, whether the same be patented or unpatented.

15. But it is contended that, inasmuch as respondent here has since 1910 been in open, notorious, and exclusive possession of the property in question, he therefore has acquired the same by adverse possession. As regards this latter contention, the minor heirs were entitled to notice of the hostile character of respondent's claim. This notice could not be given or imparted to the minor heirs until they were capable in law of receiving it. Their infancy made it impossible under the law to charge them with notice of the character or extent of respondent's claim of adverse possession, much less of the nature of the title under which respondent entered. To this notice they were entitled; and under the provision of our statute they had the right to commence this action at any time within two years after they were by law chargeable with notice. (*Northrop v. Marquam, supra.*)

The doctrine that statutes of limitation usually except infants from their operation has received eminent sanction. (1 R. C. L. 759.)

The judgment appealed from must be reversed, in so far as it affects Marie Wren and Thomas Wren, Jr., and

as to these appellants it is ordered that judgment be entered in accordance with the prayer of their complaint, to the extent of their interest in the property as heirs at law of Thomas Wren, deceased.

As to the appellant, Mary Wren, the judgment is affirmed.

ON PETITION FOR WRIT OF ERROR TO THE UNITED
STATES SUPREME COURT

By the Court, MCCARRAN, C. J.:

The earnestness with which this petition for writ of error was presented has caused me to give it more than usual attention. Especially is this true in view of the fact that a similar application may be made to any of the justices of the Supreme Court of the United States.

1, 2. It must be understood that in the first instance no federal question or matter of which the federal court would take cognizance was presented to this tribunal. It was only on petition for rehearing that a federal question was suggested. The Supreme Court of the United States has on a number of occasions laid down the rule that to suggest or set up a federal question for the first time in a petition for rehearing in the highest court of the state is not in time. (Encyclopedia of United States Supreme Court Reports, vol. 1, p. 624.) Petitioner here contends that the authorities supporting the text here cited are not pertinent or binding in the matter at bar, inasmuch as the federal question sought to be raised was not in existence until after the filing of our opinion and decision. In other words, petitioner contends that by the decision of this court the federal question was created.

This case was tried in the court below, and came to this court upon an agreed statement of facts, one phase of which was that defendant, respondent here, held the property in question by adverse possession as against appellants, and the agreed statement of facts in that respect sets forth as follows:

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"That immediately after the receipt by the said Thomas Dixon of the certificate of sale of said patented mine and mill site for the nonpayment of taxes for the year 1909, he, the said Thomas Dixon, defendant herein, entered into the possession of said patented mine and mill site, and has remained in the actual, continued, open, notorious, and exclusive possession thereof, claiming the same adversely to all persons, since the month of January, 1910; that during the years 1910, 1911, 1912, and 1914 the county assessor assessed said property, to wit, said patented mine and mill site, to the defendant herein in the manner provided by law, and the defendant herein paid all of the taxes so levied and assessed against the said property for the years 1910, 1911, 1912, and 1914 to the county treasurer and ex officio tax receiver of Eureka County, State of Nevada."

Here was an agreed statement of a fact, the elements of which were intended to support the claim of adverse possession. This statement of fact, couched in the language in which we find it, asserting possession in the respondent, Dixon, precluded the idea of possession in the appellant Mary Wren, either as an individual or in her official capacity as executrix. This statement was to my mind sufficient to warrant the assertion found in the opinion of this court that the property in question here had never been taken possession of by the executrix. If possession had ever been taken of the property by the executrix, the record is silent, save and except that by this statement of fact it is said that, if possession had ever been taken of the property by the executrix, it was at a time so far remote that the statute of limitation had run in establishment of adverse possession in favor of the respondent. Absence of possession by the executrix was the basis of one of the defenses urged by petitioner.

The assertion of this court to the effect that the executrix had never taken possession of the property was, as I view it, but minor and insignificant; however, it did

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not go beyond the record for the fact asserted. The assertion of this court in this respect may, in my judgment, be said to rest squarely upon the agreed statement of fact as to the actual, continuous, open, notorious, and exclusive possession of the respondent.

It is my conclusion: First, that there being no federal question presented to this court in the first instance, the suggestion of such comes too late on petition for rehearing; secondly, this court in making the assertion that the property in question had never been taken possession of by the executrix did not go outside the record, but, even should it be conceded, for argument's sake, that in making this assertion this court did find beyond the record, the final conclusion and judgment of the court did not turn upon that assertion, nor was the assertion a vital or essential element in arriving at the conclusion which led to the judgment in this case. In other words, the law as laid down in the opinion and decision warranted the conclusion arrived at, regardless of the question as to possession by the executrix.

Petition for a writ of error is denied.

Argument for Petitioner

[No. 2252]

STATE OF NEVADA, Ex REL. ERNEST E. BROWN,
PETITIONER, v. NEVADA INDUSTRIAL COM-
MISSION, RESPONDENT.

[161 Pac. 516]

1. MANDAMUS—WORKMEN'S COMPENSATION—AWARD.

Mandamus is not the proper remedy to compel the Industrial Commission to award an injured workman compensation, under Stats. 1913, c. 111, as amended by Stats. 1915, c. 190, since such workman has a speedy and adequate remedy at law in an action at law against the commission.

2. MANDAMUS—WORKMEN'S COMPENSATION—PAYMENT OF JUDGMENT.

Mandamus is an appropriate remedy to compel the Industrial Commission to pay a final judgment of compensation obtained by an injured workman in an action at law against the commission, where it refuses to pay such final judgment.

ORIGINAL PROCEEDING in *mandamus*, by the State, on the relation of Ernest E. Brown, against the Nevada Industrial Commission. **Demurrer to the petition sustained.**

William Forman, for Petitioner:

Mandamus is the proper remedy in the case at bar. It is not only the proper remedy, but the only remedy in the case. Petitioner has no speedy nor adequate remedy at law. *Certiorari*, prohibition, injunction, or any other remedy, extraordinary or otherwise, would not avail to give petitioner relief. This court has held that the state insurance fund, involved in the case at bar, is not a "state fund," but should be regarded as separate from the state treasury. (*State ex rel. Beebe v. McMillan*, 36 Nev. 383.) It cannot be said that the powers of the Nevada Industrial Commission to act are discretionary. (*Borgnis v. Falk Co.*, 147 Wis. 327.) "This case involves only private rights in private property which is in the possession of a state officer, but in which the state, as such, never had, and never can have, any shadow of right or property. (*Hayne v. Metropolitan Trust Co.*, 67 Minn. 251.)

When the facts, as in this case, are admitted, a *mandamus* may issue to compel the performance of the act. (Merrill on *Mandamus*, 31; *Henry v. Taylor*, 57 Iowa, 72;

Argument for Respondent

State v. Wright, 10 Nev. 175; *Humboldt Co. v. Churchill Co.*, 6 Nev. 31; *State ex rel. McGuire v. Waterman*, 5 Nev. 323; *McAlester-Edwards Coal Co. v. State*, 31 Okl. 629.)

A writ of *mandamus* is often denominated a writ of mandate. A writ of prohibition is the counterpart of a writ of mandate and arrests all proceedings. Therefore, if the contributors to the state insurance fund believed that the fund was being awarded improperly, their remedy would be by writ of prohibition. *Per contra*, if the injured man is denied the compensation to which the law says he is entitled, his remedy would be by writ of *mandamus*.

It has been frequently decided that *certiorari* extends only to jurisdictional power in purely judicial proceedings. The Nevada Industrial Commission is not a judicial body, but an administrative body, having what might be termed *quasi*-judicial functions. It is in no sense a judicial body. It could not be such, for if it did have judicial functions it would not be consistent with the provisions of the state constitution. "The writ of *certiorari* can only be issued where the inferior tribunal, in the exercise of judicial functions, has exceeded its jurisdiction." (*In Re Rourke*, 13 Nev. 253; *State ex rel. Thompson v. Board*, 23 Nev. 247; *Esmeralda v. District Court*, 18 Nev. 438.)

W. W. Griffin, for Respondent:

The facts in this case being agreed upon, the matter presents a question of law and jurisdiction for the determination of the court. Respondent admits that *mandamus* is the proper remedy, but that under the facts petitioner is not entitled to the relief demanded.

The duties of the Nevada Industrial Commission are, to a great extent, fiduciary, and the only way by which it could be estopped or prevented from spending its funds improperly would be by writ of prohibition. Conversely, the only way by which it could be made to award compensation would be by *mandamus*. If a writ of prohibition is the counterpart of a writ of mandate, then the latter must be a counterpart of the former.

Opinion of the Court—NORCROSS, C. J.

By the Court, NORCROSS, C. J.:

This is an original proceeding in *mandamus*. Paragraph 1 of the petition alleges the creation of respondent, Nevada Industrial Commission, under and by virtue of the provisions of section 8 of that certain act of the legislature entitled "An act relating to the compensation of injured workmen in the industries of this state and the compensation to their dependents where such injuries result in death, creating an Industrial Insurance Commission, providing for the creation and disbursement of funds for the compensation and care of workmen injured in the course of employment, and defining and regulating the liability of employers to their employees, and repealing all acts and parts of acts in conflict with this act," approved March 15, 1913 (Stats. 1913, p. 137), as amended March 22, 1915 (Stats. 1915, pp. 279, 282).

Paragraph 2 of said petition alleges that from the 6th day of July to the 24th day of September, 1915, inclusive, petitioner was employed by one M. E. McGhan as an engineer and millman in the operation of a quartz-mill near the town of Round Mountain in Nye County, and that during that time the relation of employer and employee existed between petitioner and said McGhan.

Paragraph 3 of said petition alleges that on the 24th day of September, 1915, while petitioner was so employed, he was accidentally injured in the machinery of said mill, resulting in the loss of the first, second, and third fingers of his right hand.

Paragraph 4 of said petition alleges that as a result of said injury petitioner was totally disabled from performing any labor or service whatever for the period of three and seven-thirtieths months, and suffered permanent partial disability as above mentioned; that under and by virtue of the provisions of the aforesaid act, petitioner is entitled to compensation from the respondent in the sum of \$1,454.

Paragraph 5 of said petition alleges that petitioner has complied with all the provisions of said act; that neither

he nor his said employer have ever rejected the provisions of said act; that prior to said injury of petitioner, petitioner's said employer had never paid to respondent any amount whatever, as is required under the provisions of said act from employers not rejecting the terms of said act, nor had any demand ever been made of such employer for such payment by respondent. That the respondent refused, and will continue to refuse, to pay petitioner said claim solely because petitioner's employer had not contributed to the state insurance fund provided for in said act.

Paragraph 6 of the petition alleges that it was and is the duty of respondent under and by virtue of said act to award and pay petitioner the amount of said claim.

Paragraph 7 of the petition alleges that petitioner has no plain, speedy, or adequate remedy at law.

To the petition a demurrer was filed alleging:

"That said petition does not state a cause of action in favor of petitioner and against respondent, nor does it state facts sufficient to entitle the petitioner to the relief prayed for therein."

This proceeding was submitted upon the briefs filed. It was assumed by the briefs, both upon the part of petitioner and respondent, that *mandamus* was the proper remedy in this case. Upon reading the petition, the court was of the opinion that a serious question was presented as to what was petitioner's remedy upon the facts alleged, and an order was made vacating the submission and directing counsel to present the question as to whether *mandamus* was an appropriate remedy. Counsel for the respective parties have filed a joint brief in which it is contended that this court should entertain the writ.

Section 38 of the act in question provides:

"The Nevada Industrial Commission is hereby authorized and empowered to prosecute, defend and maintain actions in the name of the commission for the enforcement of the provisions of this act. * * *"

From the briefs filed upon the merits, it would appear that the main, and possibly the only, controversy relative to the claim of petitioner grows out of a difference of opinion as to the construction of section 37 of the act, which reads as follows:

"If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the Nevada Industrial Commission as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 6, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or the husband, wife, child or dependent of such workman in case death result from the accident) as he would have been prior to the passage of this act. In case the recovery actually collected in such suit shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the Nevada Industrial Commission for the benefit of the accident fund. In any suit brought upon such cause of action the measure of liability shall be as provided in section 1, subdivision c (1, 2, 3 and 4) of this act. Any such cause of action assigned to the Nevada Industrial Commission may be prosecuted or compromised by the department in its discretion. Any compromise by the workmen of any such suit, which would leave a deficiency to be made good out of the

accident fund, may be made only with the written approval of the department."

1. We are of the opinion that, notwithstanding counsel contends that this proceeding only presents a question of law as to the proper construction of section 37, *supra*, the extraordinary proceeding in *mandamus* is not the proper remedy. It has been repeatedly decided by this court that *mandamus* will not lie if there is a plain, speedy, and adequate remedy at law. That there is a remedy at law against respondent upon a rejected claim of an employee, we think permits of no question. Suppose, for example, a claim is rejected by the commission upon the ground that the relation of employer and employee did not exist at the time of the accident, it would not, we think, be contended that this court, upon an original proceeding in *mandamus*, could hear evidence and determine such controverted question of fact. Again, if the commission should determine that the extent of the claimant's injuries are not as great as that asserted by the claimant, and the claimant is unwilling to accept the compensation which the commission determines he is entitled to, the claimant is entitled to have the question of the extent of his injuries determined as a fact by a court of law. Suppose that, instead of filing a demurrer to the petition in this proceeding, respondent had filed an answer and denied all the allegations of the petition, we think counsel would not contend that this court could assume to act as a court of original jurisdiction and try the issues of fact thus raised.

There has been filed in this proceeding for the information of the court a transcript of all of the proceedings before respondent in the matter of the claim of petitioner. From this transcript it appears that petitioner's claim was at one time allowed conditionally by a vote of a majority of the members of the respondent commission. Subsequently the commission reconsidered the resolution by which the claim was conditionally allowed, and the claim was rejected. It appears from this transcript

that, at one time, the question was raised whether the relation of employer and employee existed at the time of the accident. It nowhere appears from the transcript, excepting inferentially, that the respondent commission ever found the facts as alleged in the petition. While this transcript of the proceedings before the respondent commission may have no proper place in determining the questions raised upon the demurrer to the petition, it is proper, we think, to refer to the same as illustrating the reason why *mandamus* is not an appropriate remedy to enforce a rejected claim presented to such commission. Necessarily, the claim of an employee, rejected in whole or in part by the industrial commission upon any question of fact going to the extent of his injuries or as to the existence of the relationship of employer and employee at the time of the accident, must be determined in an action at law against the commission. If the remedy by an action at law is ample and the only remedy in the case of a rejected claim based upon a disagreement between the claimant and the commission as to such matters of fact, we can see no good argument why the same remedy is not as plain, speedy, and adequate where the rejection of the claim is based upon a difference of opinion as to a mere matter of law. Many cases arise in which disputes between litigants are based simply upon a difference of contention as to a matter of law. Our statutes provide for a simple method of submission of such controversies to the district courts. (Rev. Laws, 5252-5254.)

2. In the administration of the important duties imposed upon the Nevada Industrial Commission, that commission will doubtless often be required, as it interprets its duty, to reject claims in whole or in part, and both upon questions of fact and law. If a claim is finally rejected *in toto*, that is the end of it so far as the commission is concerned, unless a judgment is obtained against the commission in a court of competent jurisdiction, in which event the judgment will have the force of an allowed

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claim. Should the commission refuse to pay such final judgment, *mandamus* would be an appropriate remedy.

It was never intended that this court, through the agency of some extraordinary writ, should be made the instrument for furnishing legal advice to boards, commissions, and officers. Petitioner has or has not a legal claim against the respondent commission. A district court is the proper forum to determine the legality of his claim, and, if a legal claim, the amount he is entitled to recover under the statute. If, after a judgment in the district court, either party is dissatisfied with such judgment, the remedy of appeal to this court is available.

If the legislature had not adopted the statute under which petitioner claims compensation, he would, if he sought to enforce compensation from his employer, be compelled to institute his suit in the district court. It cannot, in reason, we think, be contended that a person entitled to compensation for personal injury has, by virtue of the statute, been granted any different remedy to establish his right to such compensation than that which before existed.

Petitioner having an adequate remedy at law, proceeding in *mandamus* is not available. (*State ex rel. Mighels v. Eggers*, 36 Nev. 364, 136 Pac. 104; *State ex rel. Abel v. Eggers*, 36 Nev. 372, 136 Pac. 100, 104; *State ex rel. Kendall v. Cole*, 38 Nev. 215, 148 Pac. 551.)

The demurrer to petition is sustained.

Argument for Petitioner

[No. 2249]

IN THE MATTER OF THE APPLICATION OF J. B. DIXON
FOR A WRIT OF HABEAS CORPUS.

[161 Pac. 737]

1. COURTS—MUNICIPAL COURT—JURISDICTION—CONSTITUTIONAL AND
STATUTORY PROVISIONS.

Const., art. 6, sec. 6, gives to district courts original jurisdiction in cases involving the legality of any tax, assessment, or municipal fine, etc.; section 8 requires the legislature to determine the number of justices of the peace in each city, etc., and provides that justice's courts shall not have jurisdiction of cases conflicting with the jurisdiction of the courts of record; and section 9 requires the legislature to fix by law the jurisdiction of municipal courts. The charter of the city of Reno (art. 14, sec. 1) created a municipal court, by section 3 gave it jurisdiction as then provided for justices of the peace as to civil or criminal cases for the violation of any ordinance, and by section 6 provided that it should be treated as a justice's court, in case its proceedings should be questioned. Rev. Laws, 5721, relating to transfer of causes from justice's court, provides that the parties cannot give evidence on questions involving the legality of any tax, municipal fine, etc. An ordinance imposed a certain license upon every attorney practicing his profession in the city, payable quarterly in accordance with the gross receipts, and thereunder petitioner was convicted in the municipal court and committed. *Held*, where the issue involved the legality of a tax and the constitutionality of the ordinance imposing the tax, the municipal court had no jurisdiction, and was bound to transfer the proceedings to the district court.

2. COURTS—MUNICIPAL COURT—JURISDICTION—LEGALITY OF TAX—
CERTIFICATION OF QUESTION.

In such case, where defendant challenged the legality of the tax or questioned the constitutionality of the ordinance in the municipal court, that court was ousted of jurisdiction and should have certified the pleading to the district court.

3. COURTS—MUNICIPAL COURTS—PLEADING—VERIFICATION.

No plea by a defendant in a justice's court need be verified, and such rule applies with equal force to the municipal court.

ORIGINAL PROCEEDING in *habeas corpus* by J. B. Dixon against J. D. Hillhouse, Chief of Police of the City of Reno. **Ordered** that the writ be perpetuated and the petitioner be restored to his liberty.

J. B. Dixon and Frame, Humphrey & Harcomb, for
Petitioner:

The city charter and the ordinance in question violate
the constitution of the United States and the constitution

Argument for Petitioner

of the State of Nevada, in that they take away property without due process of law, take away vested rights by *ex post facto* legislation, and deprive petitioner of his equal rights under the law. (*Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518; *Ex Parte Garland*, 4 Wall. 338; *Pennoyer v. Neff*, 95 U. S. 714; *People v. Erickson*, 147 N. Y. Supp. 225; *Town v. Schneider*, 3 Alaska, 58; *In Re Yot Sand*, 75 Fed. 983; *Chauvin v. Valiton*, 8 Mont. 451; *Commonwealth v. Snyder*, 182 Pa. St. 630; *State v. Montgomery*, 94 Me. 192; *State v. Hoyt*, 71 Vt. 59; *Walsh v. Denver*, 11 Colo. App. 523; *In Re Thatcher*, 190 Fed. 969, 212 Fed. 801.)

The municipal court of the city of Reno has no jurisdiction or power to try or determine matters not of a police nature. The arrest and trial of attorneys alleged to be practicing without the prescribed license is not a matter of a police nature. The city charter, article 4, section 3, expressly reserves from the jurisdiction of the municipal court all matters not of a police nature. The words "police nature" have the same meaning and are of the same legal effect as "police power." They have a definite legal meaning and have been frequently interpreted by the courts. The provisions of subdivision 42, section 10, article 12, of the city charter, were intended by the legislature to apply only to cases of a police nature or coming within the police power of the city, and were not intended to apply where the city has no power to regulate for the public health and well-being.

The jurisdiction of the municipal court is, by the express language used in the charter, which is the act creating the said court, limited to the cognizance of matters in which a person is charged with a breach or violation of an ordinance of a police nature. The failure to comply with the requirements of the ordinance imposing a tax in the nature of a revenue measure is not of a police nature, and in no way affects the peace, health, safety, or morals of the community. The court being without jurisdiction in the first place, the exercise of jurisdiction was wrongful, and the judgment of conviction

Argument for Respondent

and the commitment thereunder are null and void and of no force or effect.

Petitioner having attacked the constitutionality of the ordinance, the municipal court was without jurisdiction to proceed in the matter. "Nothing herein contained shall be construed to give such court jurisdiction to determine any such cause when it shall be made to appear by the pleadings or the verified answer that the validity of any tax, assessment or levy shall necessarily be in issue in such cause, in which case the court shall certify such cause to the district court in like manner and with the same effect as provided by law for certification of causes by justice's courts." (Reno Charter, sec. 4, art. 14.)

L. D. Summerfield, City Attorney, for Respondent:

There is nothing so sacredly inherent in the practice of the law as to exempt the members of that profession from the payment of a license tax imposed upon citizens engaged in any other useful occupation. (*Ex Parte Williams*, 31 Tex. Crim. 262, 20 S. W. 580, 21 L. R. A. 783.) "Such a tax is not a condition precedent to the right to practice law." (5 C. J. 571.) The imposition of the license tax is not the impairment of the obligation of contracts. (8 Cyc. 938; *Blanchard v. State of Florida*, 19 L. R. A. 409; Cooley on Taxation, 3d ed. vol. 2, p. 1104.)

The ordinance in question is authorized by the provisions of the charter of the city of Reno (sec. 10, art. 4). The effect is to make a license tax upon attorneys valid and constitutional. (6 C. J. 570; 4 Cyc. 898.) "Under delegated authority a municipality may impose an occupation tax upon a business or profession, although the business or profession may already have been authorized or licensed by the authority of the state." (4 Dillon, Mun. Corp., 5th ed. sec. 1408, p. 2463; *Ex Parte Counts*, 153 Pac. 93; *Ex Parte Siebenhauer*, 14 Nev. 365; *Goldthwaite v. City Council*, 50 Ala. 486.)

The ordinance in question does not take away the right to practice under the state license. (6 C. J. 571.) There

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is no conflict with the state law, as the ordinance simply imposes an additional license in accordance with the principles heretofore sustained by the appellate court. (*Ex Parte Counts, supra; Ex Parte Siebenhauer, supra.*)

The presumption is in favor of the validity of an ordinance. (2 Dillon, Mun. Corp., sec. 646; 2 McQuillin, Mun. Corp., sec. 810.)

By the Court, MCCARRAN, J.:

This is an original proceeding in *habeas corpus*.

By the return of J. D. Hillhouse, chief of police of the city of Reno, it appears that petitioner, J. B. Dixon, was on the 5th day of June, 1916, arrested under and by virtue of a warrant of arrest issued by the municipal court of the city of Reno, Washoe County; that the warrant of arrest was issued in accordance with the prayer of a complaint filed with the municipal court of that city; that, upon petitioner's plea of not guilty to the complaint, the action proceeded to trial forthwith; and that on July 5, 1916, the petitioner was by the municipal court of the city of Reno found guilty and a commitment duly issued, under which said commitment the respondent detains petitioner and deprives him of his liberty.

The complaint, under which warrant was issued for the arrest of petitioner and upon which the trial was conducted, is in part as follows:

"That on or about the 28th day of April, A. D. 1916, in the city of Reno, county of Washoe, State of Nevada, the crime of misdemeanor was committed, to wit, by J. B. Dixon, who then and there was wilfully and unlawfully practicing, and did then and there wilfully and unlawfully practice, his profession as an attorney without having first taken out and procured the municipal license required by ordinance of the city council of the said city of Reno; all of which is contrary to the form, force, and effect, and in violation of section 21 of City Ordinance No. 82, as amended, revised, and reenacted by City Ordinance No. 195 of said city of Reno."

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Petitioner filed a motion to set aside the complaint, and argued the following grounds:

"(1) That said complaint does not allege facts sufficient to constitute a public offense.

"(2) That this court has no jurisdiction or power to consider said complaint or to issue any warrant of arrest thereunder or thereupon.

"(3) That the ordinance referred to in said complaint, and sections 4, 20, and 21 thereof, are *ultra vires* and beyond the power of the city of Reno to enact.

"(4) That said ordinance and said sections are repugnant to the constitution of the United States.

"(5) That said ordinance and said sections thereof are repugnant to the constitution of the State of Nevada.

"(6) That said ordinance and said sections thereof are repugnant to the charter of the city of Reno."

The city of Reno is a duly incorporated municipality, its incorporation was founded upon special acts of the legislature of this state, and the legislature of 1915 passed an act amending certain specifically named sections of an act entitled "An act to incorporate the town of Reno, and to establish a city government therefor," approved March 16, 1903, etc. (Stats. 1915, c. 38.)

City Ordinance No. 195 is entitled "An ordinance to amend, revise, and reenact the title of, and to amend, revise, and reenact, city ordinance number 82, entitled 'An ordinance to fix, impose, and collect a license tax on certain trades, business, occupations, callings and amusements in the city of Reno; to regulate and classify the same, to fix a penalty for the violation thereof; to define the duties of certain officers in connection therewith, and to repeal all ordinances and parts of ordinances in conflict therewith,' passed and adopted October 28, 1907; and to repeal all ordinances and parts of ordinances in conflict therewith."

Section 1 of the ordinance provides:

"Every person, firm, association, or corporation engaged in carrying on, maintaining, pursuing, conducting, or transacting, or that hereafter engages in, carries on, maintains,

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pursues, conducts, or transacts, in the city of Reno the trade, business, occupation, calling, or pursuit hereinafter named, shall obtain from said city and shall pay therefor the license herein specified."

Section 4 of the ordinance provides:

"Any person, firm, association, or corporation opening, conducting, maintaining, transacting, engaging in, carrying on, or pursuing any business, trade, occupation, calling, or pursuit hereinafter named without first having obtained from said city the license herein required shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five (\$25.00) dollars and not exceeding one hundred (\$100.00) dollars, or by imprisonment in the city jail of said city not less than twenty-five (25) days and not exceeding one hundred (100) days, or both such fine and imprisonment."

Section 20 of the ordinance fixes a schedule for certain specified businesses, fixing the license in accordance with the quarterly gross receipts of such business.

Section 21 provides:

"Every attorney, doctor, physician, surgeon, veterinary surgeon, or dentist, practicing or following his or her profession in said city, shall pay for and obtain a quarterly license to carry on such business, as per the schedule hereinbefore recited in section 20 of this ordinance."

1. Petitioner here contends, among other things, first, that the municipal court of the city of Reno had no power or authority to try, hear, or determine the matters attempted to be adjudged by it at said hearing.

Section 6 of article 6 of the constitution of this state contains the following provision:

"The district courts in the several judicial districts of this state shall have original jurisdiction in all cases in equity; also in all cases at law which involve the title or the right of possession to, or the possession of real property, or mining claims, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand (exclusive of interest) or the value of the property in controversy exceeds three hundred

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dollars, also in all cases relating to the estates of deceased persons, and the persons and estates of minors and insane persons, and of the action of forcible entry and unlawful detainer; and also in all criminal cases not otherwise provided for by law; they shall also have final appellate jurisdiction in cases arising in justices' courts, and such other inferior tribunals as may be established by law. The district courts, and the judges thereof shall have power to issue writs of *mandamus*, injunction, *quo warranto*, *certiorari*, and all other writs proper and necessary to the complete exercise of their jurisdiction; and also shall have power to issue writs of *habeas corpus* on petition by, or on behalf of, any person held in actual custody in their respective districts."

Section 8 of article 6, among other things, provides:

"The legislature shall determine the number of justices of the peace to be elected in each city and township of the state, and shall fix by law their powers, duties, and responsibilities; *provided*, that such justices' courts shall not have jurisdiction of the following cases, viz.: * * * Second, of cases wherein the title to real estate, or mining claims, or questions of boundaries to land, is or may be involved; or of cases that in any manner shall conflict with the jurisdiction of the several courts of record in this state. * * *"

Section 9 of article 6 provides:

"Provision shall be made by law prescribing the powers, duties, and responsibilities of any municipal court that may be established in pursuance of section one, of this article; and also fixing by law the jurisdiction of said court, so as not to conflict with that of the several courts of record."

The municipal court of the city of Reno is created by section 1 of article 14 of the charter of the city of Reno, and by section 3 of the same article it is provided:

"The municipal court shall have the powers and jurisdiction in said city as are now provided by law for justices of the peace, wherein any person or persons are charged with the breach or violation of the provisions of

any ordinance of said city or of this charter, of a police nature; provided that the trial and proceedings in such cases shall be summary and without a jury. The said court shall have jurisdiction to hear, try and determine all cases, whether civil or criminal, for the breach or violation of any city ordinance or any provision of this charter of a police nature, and shall hear, try, determine, acquit, convict, commit, or hold to bail in accordance with the provisions of such ordinances or of this charter. The practice and proceedings in said court shall conform as nearly as practicable, to the practice and proceedings of justices' courts in similar cases. * * *

Section 6 of the charter in part provides:

"The said court shall be treated and considered as a justice's court whenever the proceedings thereof are called into question."

Section 5721, Revised Laws, having reference to the transfer of cases to the district court from the justice's court provides:

"The parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine; nor can any issue presenting such question be tried by such court.
* * *

By section 9 of article 6 of the constitution it will appear that the legislature was empowered to fix by law the jurisdiction of municipal courts, and as we read the provision it would appear that the legislature might confer upon the municipal court jurisdictional power limited to municipal purposes (*Meagher v. County of Storey*, 5 Nev. 249) embracing any subject, so long as it did not conflict with the several courts of record. Hence we are asked the question, in the light of our constitutional and statutory provisions, was it within the power of the municipal court, as that power had been conferred by the legislature in the provisions of the charter of the city of Reno, to pass upon and determine the questions of law involving the legality of the ordinances imposing the tax as

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that question was presented by the motion to set aside the complaint.

In the case of *State ex rel. Murphy and Lutz v. Rising*, 10 Nev. 97, this court had under consideration this provision of the statute, as well as sections 6 and 8 of article 6 of the constitution. The court there held that the words "all cases at law" and "all criminal cases," as used in the constitution, were intended to designate distinct categories mutually exclusive, and that the legislature has full power to parcel out the jurisdiction of criminal cases between the district courts and justices' courts.

The court, in the case of *State v. Rising*, *supra*, after asserting that the words "all cases at law" and "all criminal cases" were meant to convey the idea of distinct categories mutually exclusive, said:

"If we are correct in this view, there can be no doubt that the justice's court had jurisdiction of the offense charged against Grant, and that it was his duty to try and determine it, unless it was made satisfactorily to appear to him, before or during the trial that the action could not be tried without deciding a question of title to real property, or of the right to the possession thereof; in which case, and in which case alone, it was his duty, in obedience to the statute, and without any reference to the constitution, which, as we think, has no application to criminal cases in this particular, to transfer the proceeding to the district court."

We think this same line of reasoning will apply even more so to cases arising in the justice court with reference to the right of such court to pass upon a question of law involving the legality of any tax, impost, assessment, toll, or municipal fine.

Section 9 of article 6 of the constitution provides that the legislature shall fix the jurisdiction of municipal courts so as not to conflict with that of the several courts of record.

Now the legislature of this state, in enacting the law creating the charter of the city of Reno, provided by section 3 of article 14 of that charter that:

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"The municipal court shall have the powers and jurisdiction in said city as are now provided by law for justices of the peace, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of said city or of this charter, of a police nature."

And that section further provided:

"The practice and proceedings in said court shall conform as nearly as practicable, to the practice and proceedings of justices' courts in similar cases."

Moreover, it was provided in section 6 of the same article that:

"The said court shall be treated and considered as a justice's court whenever the proceedings thereof are called into question."

Here we have constitutional and statutory provisions reserving cases to the district court where the question of the legality of a tax is in issue as a matter of law. We have a statutory provision declaring that an issue presenting the question of the legality of a tax, impost, assessment, toll, or municipal fine shall not be tried in the justice court. The legislative act by which was created the charter of the city of Reno and from which act the municipal court of that city took its existence and its jurisdiction, declared that the powers and jurisdiction of that court should be the same as those now provided by law for justices of the peace in cases wherein any person is charged with the breach or violation of the provisions of an ordinance of the city. It further provided that the practice and procedure of the municipal court should conform as nearly as practicable to that of the justice court in similar cases, and that in all cases the municipal court should be treated and considered as a justice court whenever its proceedings were called into question.

Hence we might simplify matters here by inquiring as to what would be the required procedure if a charge of similar import were pending against petitioner in a justice court. If under the statute the justice of the peace was denied the right to try and determine the issue of law

raised wherein the legality of the tax was questioned, then that denial applies here with equal force to the municipal court.

In the light of the provisions as we find them in the charter of the city of Reno, we apply the reason as well as the interpretation which we find in the case of *State v. Rising, supra*, and in the language of Mr. Justice Beatty, as said in that case, we say there can be no doubt that the municipal court had jurisdiction of the offense charged against the petitioner, and that it was the duty of that court to try and determine it, unless it was made to appear, before or during the trial, that an issue involving the legality of a tax or the constitutionality of an ordinance imposing a tax was to be decided, in which case it was the duty of the municipal judge, in obedience to the statute, to transfer the proceedings to the district court. (Rev. Laws, 5721.)

In the case of *State v. Rising, supra*, the question was as to the jurisdiction of the justice court to try a criminal case involving a charge of malicious mischief. This court, in answer to the query as to the right of the justice court to try a case involving the right to possession of real property, there said, first of all, that the right of possession to real property was not involved in a charge of malicious mischief; that in such cases mere proof of possession is a sufficient proof. Moreover, the court held that even proof that would support a plea of freehold in the defendant would not justify or excuse him in a case of malicious mischief.

It will not, we apprehend, be seriously disputed that the license provided for in section 21 of the ordinance, being a charge or fee for the transaction of a given business, is a tax, inasmuch as it is a charge imposed upon persons and business to raise money for municipal purposes. (*City of Santa Barbara v. Stearns*, 51 Cal. 499.)

2. Defendant was charged with a misdemeanor in having failed to pay a license tax under an ordinance imposing such tax. Under such a charge we may inquire, has the defendant the right to challenge the legality of

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the license tax so imposed? Has he the right to raise the question of the constitutionality of the ordinance imposing the license tax? If the petitioner here, being charged with a misdemeanor in having violated an ordinance imposing a license tax, sought to question the constitutionality of the ordinance or raise any other questions of law, either as to the legality of that tax or as to the ordinance, such ordinance being one imposing a tax, was it not his right to do so? Was it not, moreover, his right to raise such questions in the very first court where judgment might be rendered on his guilt or innocence and where by reason of the charge his liberty was at stake? Manifestly, petitioner was so privileged. The gravamen of the charge in this case was the failure to pay the tax. Hence the legality of the tax was a matter which might properly be raised by way of defense or plea in avoidance. We find from the record that petitioner raised these questions by his motion to set aside the complaint, which was in the nature of a demurrer to the complaint, in which the jurisdiction of the court, the legality of the tax, the constitutionality of the ordinance, were all raised as an issue of law. The question of the legality of the license tax, the question of the constitutionality of the ordinance imposing the license tax, each in turn was presented to the municipal court by the pleadings of the defendant there, petitioner here. It need scarcely be observed that, as we read the constitutional provisions and provisions found in our statute, it seems manifest that it was never intended by our lawmakers that questions such as those raised in the municipal court in this instance, which challenge the constitutionality of a tax, were to be submitted to that court. The history of the constitutional, as well as the statutory, law of this state, convinces us that questions of this character, in whatever form they might arise, were reserved to another tribunal.

3. It might be said that, in the light of the decision of this court in the case of *State v. Justice Court*, 29 Nev. 191, 87 Pac. 1, 89 Pac. 24, the municipal court need not

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certify that case to the district court unless the pleading on the part of the defendant was verified. The answer to this is that no pleading on the part of the defendant in a justice court need be verified, and this applies with equal force to the municipal court.

It follows from the observations that we have made here that when the defendant in the police court of the city of Reno, charged with a misdemeanor in having violated a city ordinance imposing a license tax, raised a question of law as to the legality of the tax and the constitutionality of the ordinance imposing the tax, an issue of law was presented to the police court involving a question as to which, by the provisions of section 5721, Revised Laws, no evidence could be entertained; nor could any issue presenting such question be tried by that court. The municipal court, therefore, should have proceeded no further, but under the provisions of the statute should have suspended all further proceedings in the action and certified the pleadings to the district court.

The judgment rendered by the municipal court in the premises was void.

Petitioner being detained on such a judgment is entitled to be released on *habeas corpus*.

It is, therefore, ordered that the writ be perpetuated and that petitioner be restored to his liberty.

Argument for Appellant

[No. 2204]

**IN THE MATTER OF THE ESTATE OF WARREN W.
WILLIAMS, DECEASED.**

[161 Pac. 741]

**1. TAXATION—INHERITANCE TAX—COMMUNITY PROPERTY—INTEREST
OF WIFE.**

Under Rev. Laws, 2156, defining community property, and section 2165, providing that upon the death of the husband one-half of the community property goes to the surviving wife, the right of the wife in the community property during her husband's life is not a mere expectancy, but is a property interest, though subject to the husband's control, and at the husband's death it is merely freed from his control, and does not pass under the inheritance laws, and therefore is not subject to taxation under Stats. 1913, c. 266, sec. 1, imposing a tax on all property passing by will or statutes of inheritance.

**2. HUSBAND AND WIFE—COMMUNITY PROPERTY—NATURE OF WIFE'S
INTEREST—STATUTE—"HELD."**

The use of the expression "goes to" the wife in Rev. Laws, 2165, different from the expression "belongs to" the husband in sec. 2164, does not show an intention of the legislature that the interest of the wife in the community should vest only after the husband's death, in view of Const., art. 4, sec. 31, requiring laws to be passed defining the rights of the wife to property held in common with her husband, since "held" does not convey the idea of mere expectancy, but imports ownership.

APPEAL from Eighth Judicial District Court, Churchill County; *T. C. Hart*, Judge.

PROCEEDINGS to determine the tax on the estate of Warren W. Williams, deceased. From an order adjudging the wife's interest in the community subject to tax, the wife appeals. **Reversed and remanded**, with instructions to enter judgment for appellant.

Hoyt, Gibbons & French, for Appellant:

As the laws of inheritance between husband and wife apply only to the separate property, the husband and wife do not inherit any part of the community property from each other, therefore the portion of the widow is not subject to the inheritance tax. (Rev. Laws, 6116, 6125.)

If throughout her married life the wife had an undivided interest in the community estate, it must follow that upon the death of the husband she merely continues the

Argument for Respondent

owner and holder of the estate which she has owned throughout the married relation, the other one-half passing to heirs other than herself, or to devisees under the will of the deceased. (Const. Nev., sec. 31, art. 4.)

In obedience to the mandate of the constitution, the legislature provided what is separate property and what is community property, clearly specifying that the estate known as community property is held by the husband and wife just as an estate of joint tenancy may be so held. (Rev. Laws, 2156; *Holyoke v. Johnson*, 3 Pac. 841; *Warburton v. White*, 176 U. S. 484, 44 L. Ed. 555; *Arnett v. Reade*, 220 U. S. 311, 55 L. Ed. 477, 36 L. R. A. n. s. 1040; 5 R. C. L. 823.)

The surviving spouse does not acquire the estate of the deceased spouse by inheritance, and hence the share of a widow is not subject to the tax imposed upon inheritances. (*Marshall's Succession*, 118 La. 212, 42 South. 778; *Kohny v. Dunbar*, 121 Pac. 544; 39 L. R. A. n. s. 1107.) Under the law as construed in Nevada this is the generally recognized doctrine, and has been in principle already adopted as the rule of decision. (*Wright v. Smith*, 19 Nev. 146, 7 Pac. 365; *In Re Sanford's Estate*, 137 N. W. 864; *In Re Inheritance Tax of Strahan's Estate*, 142 N. W. 678.)

With the exception of the State of Illinois, where common-law dower obtains, and the State of California, where community-property law obtains, all of the states sustain the contention that upon the death of the husband the wife's estate comes to her by operation of law, and is therefore not subject to inheritance tax. (*In Re Bullen*, 151 Pac. 533.)

Geo. B. Thatcher, Attorney-General, for Respondent:

The California decisions, being based upon a statute similar in all respects to that of Nevada, should be followed, and the decision of the lower court herein affirmed. (Rev. Laws, 2165; Cal. Civil Code, 1903, sec. 1402.) The California Supreme Court has rendered a number of decisions determining the interest of the widow in the

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community property. (*In Re Burdick*, 112 Cal. 393; *Spreckels v. Spreckels*, 116 Cal. 339; *Sharp v. Loupe*, 120 Cal. 93.) None of the foregoing cases was decided on a question of taxation of the community property under an inheritance tax law, for the reason that such law was not adopted in California until 1905. However, immediately upon the adoption of the inheritance tax law, the supreme court of that state reaffirmed the doctrine that the widow takes her share of the community property as an heir. (*Estate of Moffitt*, 153 Cal. 359; *People v. Lebus*, 96 Pac. 1118; *Estate of Kennedy*, 157 Cal. 523; *Estate of Rossi*, 169 Cal. 148.)

"In arriving at the meaning of the statute under consideration, it is proper to remember that a succession tax is not a burden imposed upon property, but is a privilege tax upon the right of taking property from another, whether by will or devolution as a matter of law." (*Knox v. Emerson*, 123 Tenn. 409.)

It cannot be said that the estates of husband and wife in community property are identical, when in the case of the death of the wife the whole estate "belongs" to the husband, while in the case of the death of the husband one-half of the community property "goes" to the wife. (Rev. Laws, 2164; *State v. Fox*, 45 N. W. 875; *Gammon v. Gammon Theological Seminary*, 153 Ill. 41, 38 N. E. 890; *Commonwealth v. Hamilton*, 81 Mass. 480; *Wright v. Smith*, 19 Nev. 143; *Estate of Cook*, 34 Nev. 217; *Thornton v. Zea*, 22 Tex. Civ. App. 509.)

By the Court, MCCARRAN, J.:

Warren W. Williams died January 24, 1914, leaving an estate approximating \$384,000. In arriving at an amount upon which an inheritance tax would fall, deductions were made amounting to \$55,887.77, leaving a balance in the estate of \$328,527.33.

The deceased left a will in which he set forth:

"I hereby declare that all of my property is community property, one-half of which belongs to my wife; and for

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that reason I hereby refrain from any attempt to in any wise dispose of that portion of the same by will or testament."

The district court found that the estate of the surviving wife came to her by inheritance and was liable to taxation under our inheritance tax law, and therefore adjudged the amount of \$4,620.55 to be payable against the widow's one-half of the community property. From this order appeal is taken.

One question is presented here, namely, did the surviving widow of Warren W. Williams, deceased, take her one-half of the community property left by the decedent as an heir, or was the one-half of the community property something which belonged to her absolutely in her own right and as such did not pass to her by succession or inheritance?

Our inheritance tax law was enacted by the legislature of 1913, and is found on page 411 of the session acts of that year.

Section 1 of the act provides:

"A tax shall be and is hereby imposed upon the transfer of any and all property within the jurisdiction of this state, and any interest therein or income therefrom, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, not hereinafter exempted, which shall pass in trust or otherwise by will or by the statutes of inheritance of this or any other state or by deed, grant, sale, or gift made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor, or donor or intended to take effect in possession or enjoyment at or after such death, as specified in this act. * * *"

The property in question, being one-half of the property of which the decedent died possessed, did not pass by will in this instance, inasmuch as the decedent made no attempt to convey in that manner. Our state is one of those in which the law of community property prevails. In 1873 our legislature, in compliance with constitutional

provision, passed an act, defining the rights of husband and wife, and section 1 thereof prescribes:

"All property of the wife, owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and all property of the husband, owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." (Rev. Laws, 2155.)

By section 2 of the act, the legislature of this state specifically defined and limited the property that should be known and designated as community property. It says:

"All other property acquired, after marriage, by either husband or wife, or both, except as provided in sections 14 and 15 in this act, is community property." (Rev. Laws, 2156.)

Section 14 of the act has to do with the earnings and accumulations of a wife while living separate from her husband; section 15 bears upon a similar subject; and neither has any effect on the matter under consideration. Section 2165 of our Revised Laws provides:

"Upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his surviving children equally, and in the absence of both such disposition and surviving children, the entire community property belongs without administration to the surviving wife, except as hereinafter provided, subject, however, to all debts contracted by the husband during his life that were not barred by the statute of limitation at the time of his death. * * *

Hence, in the event of the death of the husband, one-half of the community property, according to the statute, "goes to the surviving wife," and the other half is subject to whatever testamentary disposition the deceased husband may have seen fit to make.

The language of our statute relative to the disposition of the community property in the event of the death of the wife is somewhat different. It provides:

"Upon the death of the wife the entire community property belongs, without administration, to the surviving husband. * * *" (Rev. Laws, 2164.)

Hence in these two sections of our Revised Laws, passed long prior to the time at which any inheritance tax law was considered in this state, we find the law governing the disposition of property belonging to the estate which was held in the community of husband and wife, the record title of which may have been in the husband alone.

1. It is the contention of respondent in this instance that the one-half of the community property which under the statute goes to the surviving wife is but an estate in expectancy, and that she takes the same as an heir. In support of their contention, they cite the several decisions rendered by the Supreme Court of California, and lay special emphasis upon the fact that these decisions were rendered in the light of a statute of which our section 2165 is in all probability a copy. (*In Re Burdick*, 112 Cal. 393, 44 Pac. 734; *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Sharp v. Loupe*, 120 Cal. 93, 52 Pac. 134, 586; *Plass v. Plass*, 121 Cal. 133, 53 Pac. 448; *Estate of Moffitt*, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. n.s. 207; *Keating v. Smith*, 154 Cal. 186, 97 Pac. 300; *Estate of Kennedy*, 157 Cal. 523, 108 Pac. 280, 29 L. R. A. n.s. 428; *Estate of Rossi*, 169 Cal. 148, 146 Pac. 430; *Knox v. Emerson*, 123 Tenn. 409, 131 S. W. 972.)

We are further reminded by respondent that as early as 1860 the Supreme Court of California, speaking through Mr. Chief Justice Field, used the expression:

"The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor." (*Van Maren v. Johnson*, 15 Cal. 308.)

The expression of the Supreme Court in that case was commented on in the later case of *De Godey v. Godey*, 39 Cal. 164, and there the court, referring to the community property, said:

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"It belongs to the matrimonial community, and not less to the wife than to the husband. It is true that the interest of the wife therein pending the marriage has been termed 'a mere expectancy' (*Van Maren v. Johnson*, 15 Cal. 308); but while, perhaps, no other technical designation would so nearly define its character, it is, at the same time, an interest so vested in her, as that husband cannot deprive her of it by his will (*Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125), nor voluntarily alienate it for the mere purpose of divesting her of her claims to it."

The court, continuing, made the further observation, and one which we deem pertinent on the subject, bearing upon the thought evidenced in the written lines of statute law, that the wife is an active party in the community, and where by their joint efforts the husband and wife acquire property, her right therein at all times is a thing recognized. The court says:

"The theory upon which the right of the wife is founded (as we said in *Galland v. Galland*, 38 Cal. 265) is that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them if the marriage tie is dissolved either by the death of the husband or by the decree of the court, etc. Her mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband. It is true that the law confers upon the latter the authority to manage and control it during the existence of the marriage, and the power to sell it for the benefit of the community, but not, as we have seen, so as to defraud the community of it."

In the *Matter of the Estate of Burdick*, 112 Cal. 387, 44 Pac. 734, the court there, speaking of the wife's interest in the community property, reasons thus:

"No one disputes that it is succession; but the language is the same in regard to the moiety given to the wife. It 'goes' to her just as it 'goes' to the descendants."

The term "goes," as used in section 1402 of the civil code of California, it will be seen, is used in section 2165 of our

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code. This is the term referred to where, in the assertions last quoted, the court says, "It 'goes' to her just as it 'goes' to the descendants." This conclusion is scarcely borne out by the provisions of the statute, because under any number of decisions in California, as well as in other jurisdictions having similar code provisions, it has been held that the portion of the community property which is by statute reserved to the wife is not subject to testamentary disposition; and it cannot be correctly said that it goes to her just as it goes to the descendants. The descendants may take by will or under the statutory provisions governing the laws of descent, but to the wife is expressly reserved one-half of the property belonging to the community to which she contributed her efforts jointly with her husband. Community property, that peculiar class of property designated by statute, contemplates the existence of only two persons, namely, the husband and wife, living in the marriage status. Other descendants play no part in the creation of this estate. They may contribute to its accumulation or they may not. As to this the law gives no concern. But as to the community of husband and wife, the law contemplates property acquired by the joint efforts of the two, and seeks to designate, without segregation, an interest of which the wife cannot be deprived by the testamentary act of her husband, and to that extent goes to her by operation of the very law which created the estate itself, as distinguished from that portion of the community property which may go to the descendants under testamentary disposition or the laws of descent.

Mr. Justice Harrison, in a separate opinion concurred in by Justice Garoutte, in the *Matter of the Estate of Burdick*, *supra*, said:

"The wife's interest in the community property upon the death of the husband has many incidents similar to those of an heir, but I do not think that, under the language and spirit of the laws of this state, she can be said to be his heir to her share of that property, or

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that her interest therein comes to her by virtue of a 'succession' to the property of her husband. The property that is acquired by the labor of the wife during the marriage, equally with that acquired by the labor of the husband, becomes community property; and, although section 172 of the civil code gives to the husband the management and control of the community property—that acquired by her labor as well as that acquired by his—yet by the terms of the same section he cannot give away, or convey without valuable consideration, any portion of this property, unless she gives her written consent thereto."

Continuing, he said:

"Although this interest of the wife in the community property may not fall within the common-law definition of an 'estate,' it is not to be classed as a 'mere possibility,' like the expectancy of an heir."

After referring to the cases of *Van Maren v. Johnson*, *supra*, and *Packard v. Arellanes*, 17 Cal. 525, as to the term "mere expectancy," used in those cases, the learned justice continued by saying:

"It is a misapplication of terms to say that the property which the wife has 'acquired' during the marriage by her skill or labor, and of which her husband had not, in his lifetime, any power of voluntary conveyance, except with her consent, or of testamentary disposition, is inherited from him; and to refer her rights in the community property to 'succession,' under the language of section 1383 of the civil code, begs the entire question."

The position taken by the Supreme Court of California in the *Matter of the Estate of Burdick*, *supra*, was again accepted by that court in the case of *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 229, 36 L. R. A. 497, 58 Am. St. Rep. 170. In these cases the question of the application of the inheritance tax law was not under consideration, but in the case of the *Matter of the Estate of Moffitt*, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. n. s. 207, the question of the surviving wife's share of the community property

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being subject to the payment of inheritance tax was the principal matter under consideration and the court there, in applying the inheritance tax law, referred to and reaffirmed the rule laid down in the cases of *In Re Burdick*, *Spreckels v. Spreckels*, and *Sharp v. Loupe*, and in reality made the rule in these cases the basis for the conclusion that the interest of the wife in the community property is subject to the inheritance tax.

In the *Matter of the Estate of Kennedy*, 157 Cal. 516, 108 Pac. 280, 29 L. R. A. n. s. 428, the question of the application of the inheritance tax law to the wife's portion of the community property was again under consideration, and there again the court referred to its former decisions, and especially to the decision in the *Matter of the Estate of Moffitt*, *supra*, and in respect to the latter said that the conclusion there reached—

"was based solely on the proposition, established in this state by several prior decisions, that the wife takes such property solely by succession as an heir of the husband, and therefore 'by the intestate laws of this state.'"

The Supreme Court of Illinois, in the case of *Billings v. People*, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807, had under consideration the application of an inheritance tax as applicable to property passing to a surviving wife under a statute which read as follows:

"The surviving husband or wife shall be endowed of the third part of all of the lands whereof the deceased husband or wife was seized of an estate of inheritance, at any time during the marriage, unless the same shall have been relinquished in legal form." (Hurd's Rev. St. Ill. 1899, c. 41, sec. 1.)

The court there, speaking through Mr. Justice Carter, held that a wife's interest in the realty of her deceased husband was subject to the tax.

Hence, in these two jurisdictions, one a community, the other a dower estate, the courts have held practically to the same conclusion, namely, that the wife takes as an heir from her husband.

The Supreme Court of Nebraska, in considering the

question in the light of statutes which do not recognize community property as such, but under which the surviving spouse takes a one-fourth interest of all the real estate of which the wife or husband was seized of an estate of inheritance, at first followed the rule laid down by the Supreme Court of California in *Re Moffitt* and *In Re Kennedy*, and likewise adopted the conclusion reached by the Supreme Court of Illinois in the case of *Billings v. People*; and in the *Matter of the Estate of Sanford*, 90 Neb. 410, 133 N. W. 870, 45 L. R. A. n. s. 228, held that the surviving wife's interest was subject to the inheritance tax; but the court, on rehearing in the last-named case, reversed its former decision made in the same case, and held that the value of the widow's dower interest should be deducted from the appraised value of the estate and the inheritance tax should be computed on the remainder thereof. In this respect the court said:

"It would seem, from a review of the cases decided since our opinion was adopted that such is the weight of authority. The reason for the rule seems to be that the widow takes her dower interest in the estate of her deceased husband by operation of law; that she could not be deprived of it by his will; that it is something which belongs to her absolutely and independent of any right of inheritance or succession, and therefore so much of the estate as belonged to her by right is not chargeable with an inheritance tax." (*In Re Sanford*, 91 Neb. 753, 137 N. W. 864, 45 L. R. A. n. s. 236.)

Considering the same subject in the *Matter of the Estate of Strahan*, 93 Neb. 828, 142 N. W. 678, the court reaffirmed its position laid down on rehearing in *Re Sanford*, and there made some very pertinent observations bearing on the reason for the conclusion reached relative to the nature of the wife's interest by dower in the estate of her deceased husband, saying:

"She cannot be deprived of that interest by his will. It is something which belongs to her absolutely and independently of any right of inheritance or succession. Strictly speaking, the widow's share should be considered

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as immune, rather than exempt, from an inheritance tax. It is free, rather than freed, from such tax. It is not excepted from the taxable class because it never was in such class. Like all debts, taxes, costs, expenses and other similar items, it is deducted before any inheritance tax is assessed. The share of the realty and personalty, which under our law go to the widow independent of any will or act of the husband, is not, so to speak, a part of his estate, and is no more liable to a succession tax at his death than is her individual property derived from her own ancestors and held in her own name, though the husband may have had the management and control of the estate during his lifetime. The effect of our decedent law is practically the same as the law of community of property, and the courts of those states which have adopted that law have held, with but a single exception, that the wife is not liable, upon the death of her husband, to pay an inheritance tax on her one-half of the community property, for the reason that the property does not pass to her by will or by the intestate laws of the state."

They commented on the rule applied thus:

"It is sustained by the greater weight of authority, and the more recent decisions of the courts of last resort in this country."

In the *Matter of Avery's Estate*, 34 Pa. 204, the supreme court of that state held that where a testator devised his whole estate to his executors in trust for legatees and devisees, and the widow refused to take under the will, she took her share under her paramount title as a widow, and not as a payment out of the fund bequeathed to the executors in trust, and that therefore her share so taken was not subject to inheritance tax.

In *Re Weiler*, 122 N. Y. Supp. 608, and *In Re Starbuck*, 122 N. Y. Supp. 584, and in many other cases referred to, the courts of New York, in dealing with the widow's estate of dower, have held that such "was property which became vested as an inchoate estate upon her marriage and consummate upon the death of her husband, independent of the will, and not by virtue thereof."

Speaking on the subject of the exemption of community property from inheritance tax, Mr. Ross, in his work on *Inheritance Taxation*, page 83, comments thus:

"That the independence of dower from the law of succession and testamentary disposition, and its consequent exemption from inheritance taxation, have not readily been discerned, is not surprising in view of the peculiar features of dower and the obscurity of the law on which it rests. The surprise comes when, in a jurisdiction where the community system has been adopted, the exemption of the share of a wife in the common property on the death of her husband should be doubted. Yet that doubt has arisen, and, in California, has been resolved adversely to the wife. Some years ago the supreme court of the state made the startling announcement that the interest of a wife in the community property during the lifetime of her husband is only an expectancy, and that on his death she takes it as his heir. (*Matter of Burdick*, 112 Cal. 387; *Spreckels v. Spreckels*, 116 Cal. 339; *Sharp v. Loupe*, 120 Cal. 89.) This notion all but ignores the community property rights of the wife, and reduces the community system to a mere name without substance. It is a misconception of the law, and has been so recognized by other courts, but it is still adhered to in California, with the result that the share of a wife in the community property is, on her husband's death, subject to the inheritance tax."

A consideration of this matter was entertained by the Supreme Court of Idaho in the case of *Kohny v. Dunbar*, 21 Idaho, 258, 121 Pac. 544, 39 L. R. A. n.s. 1107, Ann. Cas. 1913D, 492. The statute of Idaho, like our statute, provides that: "All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife, is community property, unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use. * * *"

The Idaho statute in this respect compares with section

2156 of our Revised Laws. Section 2686 of the statute of Idaho provides:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate. * * *

This section of the Idaho statute compares with section 2160 of our Revised Laws. Section 5713 of the Revised Code of Idaho is as follows:

"Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration."

The provision in this section of the codes of Idaho by which one-half of the community property goes to the surviving spouse differs some from sections 2164 and 2165 of our Revised Laws, inasmuch as by the former section of our code it is provided that on the death of the wife the entire community property belongs without administration to the surviving husband, while in the latter section of our code it provides, as does the code of Idaho, that upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to testamentary disposition of the husband.

Mr. Justice Ailshie, in speaking for the Supreme Court of Idaho, after dwelling at some length on the laws of that state relative to the acquisition and disposition of community property, says:

"The foregoing section (section 5713, Revised Codes) of

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the statute recognizes the husband and wife as equal partners in the community estate, and it authorizes each to dispose of his or her half by will. It also provides that the survivor shall continue to be the owner of half of such property subject only to the payment of the community debts. This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent, or inheritance, but as survivor of the marital community or partnership."

In an early case (*Hall v. Johns*, 17 Idaho, 224, 105 Pac. 71) that court had expressed itself that:

"The title to the community property is in the husband, and during the existence of the community, the wife's interest in the community property is a mere expectancy."

In the case of *Kohny v. Dunbar*, *supra*, however, the court dwelt upon this expression, and emphasized the fact that, while such an expression was applicable to the matter involved in the case of *Hall v. Johns*, as it might have been applicable when used by the Supreme Court of California in the case of *In Re Burdick*, *supra*, it had no reference, and could not be correctly asserted where the question involved was the determination of the nature of the wife's interest in the community property.

The Supreme Court of Utah, in the case of the *Estate of Bullen*, 151 Pac. 533, L. R. A. 1916C, 670, reviews at length various decisions rendered in the several jurisdictions, and under the several statutory provisions, on the subject of the application of the inheritance tax law to property passing to the surviving spouse. The statute of the State of Utah (Comp. Laws 1907, sec. 2826), somewhat similar to that found in Nebraska, provides:

"One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during marriage, and to which the wife had made no relinquishment of her rights, shall be set apart as her property in fee simple if she survive him. * * *

The court there held that:

"What the wife receives under section 2826 one-third

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in fee simple of all the legal and equitable estate in real property possessed by the husband during coverture, and not relinquished by her, she receives, not as an heir of her husband, but in her own right, something which belongs to her absolutely, and of which she could not have been deprived by will or any other voluntary act of her husband without her consent. Under that section, she is not an heir within the meaning of our intestate or succession statutes. (*Waddle v. Frazier*, 245 Mo. 391, 151 S. W. 87; *Golder v. Golder*, 95 Me. 259, 49 Atl. 1050; *Gardner v. Skinner*, 195 Mass. 164, 80 N. E. 825; *Braun v. Mathieson*, 139 Iowa, 409, 116 N. W. 789; *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 251, 30 Am. Rep. 554; *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; *Miller v. Finegan*, 26 Fla. 29, 7 South. 140, 6 L. R. A. 813.)"

In the case of *Warburton v. White*, 176 U. S. 494, 20 Sup. Ct. 409, 44 L. Ed. 555, the Supreme Court of the United States, speaking through Mr. Justice White, now Chief Justice, in considering the question, under the statutes of the State of Washington, on the necessity of the wife joining with the husband in the disposition of community property, reviewed the several decisions of the Supreme Court of the State of Washington on the subject, and in dwelling on the interest of the wife in the community property said:

"Property acquired during marriage with community funds becomes an acquet of the community, and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control, and power of sale of such property, this right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community; the proceeds of the property when sold by him becoming an acquet of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community."

Mr. Justice Holmes in speaking for the Supreme Court of the United States in the case of *Arnett v. Reade*, 220 U. S. 311, referred to the decision in the case of *Warburton v. White*, *supra*, and, addressing himself to the same subject, said:

"It is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband."

Mr. Ross, in his work on Inheritance Taxation, after referring to the several decisions of the Supreme Court of California, makes special note of the decision of the Supreme Court of Idaho in the case of *Kohny v. Dunbar*, *supra*, and says: "There can be no doubt that the Idaho court has reached the right conclusion"; and then proceeds to make the further observation which we think most applicable to the provisions of our statute as they are presented to us, and says:

"The legislature, in adopting the community system, intended to provide a real marital community in property and accord to the wife a fuller measure of property rights than was hers under the common law. The legislature did not suppose it was providing her a mere expectancy during the husband's life and an inheritance on his death. That would be far from what is contemplated in the very nature of community property. And certainly, in adopting the inheritance system of taxation, the legislature did not have in mind the exaction of tribute from the community interest of a wife upon the death of her husband. In his lifetime such interest is her own property, practically in the fullest sense, except that the law constitutes him the agent for its control and management, and the removal of the agent by death in no wise works a transmission of title to be subjected to the succession tax." (Ross, Inheritance Taxation, 84.)

2. Respondent argues at some length that the expression "goes to" in section 2165 implies a different significance from the term "belongs" as found in section 2164 with

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reference to the community property on the death of the wife. In this respect they say that the term "goes to," as used with reference to the community property on the death of the husband, means "vests in"; and hence we are to infer that this term was used advisedly by the legislature to convey the idea that the wife's interest in the community property vested in her only after the death of the husband; and this would lead to the conclusion that prior to the dissolution of the community the wife was not in any wise vested with any part of the community property.

We are not willing to accept this reasoning as against those provisions which we find in our general legislation on the subject of the relation of husband and wife, and more especially in view of the peculiar provisions of our organic law on the subject.

Section 31 of article 4 of our constitution reads:

"All property, both real and personal, of the wife owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed, more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

The word "held" has been construed to mean ownership (*Wey v. Salt Lake City*, 35 Utah, 504, 101 Pac. 381; *Higgins v. Downs*, 91 N. Y. Supp. 937), and we find no good reason for holding that the word "held," as here used, was not intended to convey the idea of a peculiar yet distinct ownership. Here is a provision in the constitution recognizing the separate property of the wife and also recognizing a class of property which would be known as community property, which property would be "held" by her in common with her husband. Would it not be a distortion of the sense generally conveyed by the word "held," and especially in view of the manner of its use here, to say that it only conveyed an idea of future expectancy? Upon what substantial theory shall we say

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that it was used by the framers of the constitution to convey no greater idea of property ownership in the wife than that of an heir of her husband, with whom it was declared she held in common?

Here was a constitutional recognition of the wife's "rights" in two distinct classes of property, *i. e.*, that which was designated her separate property, and that which was designated as property "held by her in common with her husband." Here is a peculiar avoidance of terms that might convey an indefinite sense. If the framers of the organic law sought to protect in the wife a right in the community property which would only accrue to her on the dissolution of the community; if they sought to have laws enacted more clearly defining the rights of the wife to an interest in the community property which should come to her on the death of the husband; why did they use the comprehensive term "rights of the wife * * * to that (property) held in common with her husband?" Any reasonable interpretation of this provision must, as we view it, convey the idea of property rights *in præsenti*.

We are referred by respondent to the decision of the Supreme Court of Tennessee in the case of *Knox v. Emerson*, 123 Tenn. 415, 131 S. W. 972. The case is not strictly in point here, save by way of contrast with the facts therein dealt with. The principal question was as to the application of the inheritance tax law where the estate passed by will. This decision was rendered in the light of a statute establishing a dower interest in favor of the wife. The court there held no more than to declare the property thus passing to be subject to the taxation. The court reasserts a principle declared in *State v. Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178, wherein it says:

"In arriving at the meaning of the statute under consideration, it is proper to remember that a succession tax is not a burden imposed upon property, but is a privilege tax upon the right of taking property from another, whether by will or devolution as a matter of law."

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It is not necessary to dwell upon this principle here, because, viewing the matter as we do in the light of the great weight of authority, and especially under statutes providing for the community system, there is no "taking property from another, either by will or legal devolution." The property here going to appellant was property which she at all times under our statutory provision "held in common with her husband." Hence there was no privilege to be taxed, but rather a "right" in property recognized by statutory prescription "held" by her at all times "in common with her husband." The death of the husband only dissolved the community, and released that which she held from the statutory dominance of her deceased spouse.

The decision of the lower court in this case was based squarely upon that line of decisions which we find emanating from the Supreme Court of California, and to which we have referred more or less extensively, the doctrine announced by which has been commented on, if not criticized, in the several jurisdictions where this matter has been carefully considered. The doctrine asserted by the Supreme Court of California in these several decisions is based upon the conclusion that the interest of the wife in the community property is the mere possibility of an expectant heir. This doctrine has received the stamp of disapproval by the Supreme Court of the United States in the case of *Arnett v. Reade, supra*, as well as by an equally significant expression coming from that court in the case of *Warburton v. White, supra*. For this reason, if for no other, we would be unwilling to follow this doctrine, notwithstanding its eminent authority, and the further fact that the statutes of the State of California are almost identical to our own. But more than this, we are at a loss to reconcile the decisions of that court in the cases of *Moffitt*, *Spreckels*, and *Kennedy, supra*, holding that the surviving wife takes her share of the community property only as an heir, with the doctrine found in many other decisions, for example, *De Godey v. Godey*, 39 Cal. 157, to the effect that the wife's "right in the community

property is as well defined * * * in contemplation of law, even during the marriage, as is that of the husband."

This court, speaking through Mr. Justice Leonard, in the case of *Wright v. Smith*, 19 Nev. 143, 7 Pac. 365, in considering the effect of our statutory provision on the community property on the death of the husband, said:

"Under the statute the title to community property, subject to the payment of legal indebtedness, was in appellant (surviving wife), and an administrator was not required to convey the title or distribute the estate."

The decision in the case of *Wright v. Smith*, *supra*, as indicated by the expression quoted, as well as by other expressions found in the opinion, supports the position we take here.

From all our statutory enactments bearing upon the subject of the relation of husband and wife, and especially from those having to do with the acquisition, retention, and disposition of the community property, we are unable to arrive at a conclusion that the constitution framers and the legislature, in establishing the community system and in promulgating laws defining the rights of husband and wife as to property thus held, intended other than that the wife should have an interest in the property acquired by the joint effort of the community, which interest, while it should remain in a sense indistinguishable during the existence of the community, was nevertheless a property interest of which she was, at all times, possessed. The fact that the legislature may have seen fit to place the control of this community property in the husband in no wise detracts from the fact that the property as such was a thing in which the wife had at all times a vested interest. We are unwilling to accept what we deem an inconsistency which would hold that, while, on the one hand, the husband could not deprive the wife of her interest by testamentary disposition, and that, as illustrated in the case at bar, no provision or mention need be made in a will or testament as to the disposition of that one-half of the community property which, under the law, goes to the wife, yet, on the other

Points decided

hand, she can be regarded as taking this property only as an expectant heir.

It may, we think, be asserted, supported by the great weight of authority, that the interest of the wife in the community property and her title thereto is no less than that held by the husband, and this interest and title in the wife is not to be regarded as a mere expectancy. (5 R. C. L. 850.)

Concluding, as we do, that the wife's interest in the community property goes to her, not by succession or inheritance, but rather by a right vested in her at all times during marriage, it follows that it is not subject to the law of inheritance tax.

The judgment is reversed.

The cause is remanded, with instructions to the lower court to enter judgment for the appellant.

[No. 2217]

**IN THE MATTER OF THE ESTATE OF OTTO HARTUNG,
DECEASED.**

[160 Pac. 782; 161 Pac. 715]

1. CHARITIES—CONSTRUCTION—DESIGNATION OF LEGATEES—CHARITABLE INSTITUTIONS—REQUEST TO FRATERNAL ORDER TO ESTABLISH AN ORPHANS' HOME "WORTHY OF ITS NAME."

Under a will devising the residue of an estate to an Independent Order of Odd Fellows, the income therefrom to be paid over to them annually, if within five years from testator's death the order established a home for orphans "worthy of its name," the words "worthy of its name" did not require the expenditure therefor of the sum of \$25,000 as specified for a school building in another paragraph of the will, but the will made the order itself judge as to whether or not the home was worthy of its name, subject to the right of the courts to finally determine the question.

2. CHARITIES—CONDITION—ESTABLISHMENT BY FRATERNAL ORDER OF A HOME "WORTHY OF ITS NAME."

A devise conditioned upon establishing by fraternal order of an orphans' home "worthy of its name" was satisfied by the establishment of a home which, considering the strength of the order in the state, the population of the state, and the general conditions existing therein, compared favorably with similar institutions of the order elsewhere.

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3. CHARITIES—CONDITIONS—PERFORMANCE—SUFFICIENCY—ESTABLISHMENT OF ORPHANS' HOME "NEAR" A CITY.

A devise conditioned on the establishment of an orphans' home "near" a city was satisfied by its establishment within the city corporate limits; the apparent intention by such direction being to confine the location of the home to the vicinity of the city, and not to exclude it from the city limits.

4. PERPETUITIES—CHARITABLE GIFT—"PUBLIC CHARITY."

A bequest of the income of the residue of an estate to a fraternal order if the order established an orphans' home as provided therein, did not violate the common-law rule against perpetuities, such home being a public charity, since its use was not confined to any privileged or special class of orphans.

5. CHARITIES—CONSTRUCTION OF BEQUEST—CHARITABLE USE.

A bequest of the income of an estate, to be paid over to a fraternal order annually, if within five years from testator's death the order established an orphans' home as provided therein, *held* not void as imposing no imperative duty upon the order to devote the money to a charitable use, since under the will the income was to be used in the maintenance of the home.

ON PETITION FOR REHEARING**1. WILLS—CONSTRUCTION—INTENTION OF TESTATOR.**

Although the intention of a testator must appear from a perusal of the will, although not necessarily articulated in formal language, the court may take into consideration, in determining such intention, the subject-matter, chief aim of the testator, and all the surrounding circumstances.

2. CHARITIES—CONSTRUCTION—INTENTION OF TESTATOR—"MONUMENT."

A will gave the residue of the testator's estate to defendant fraternal order if, within five years from the date of his death, the fraternal order should establish a home for orphans and foundlings to be named after the testator's son, and providing, as an alternative, if the order should not accept, a similar gift of the income of the residue to a school district on condition they build an industrial school named after testator's son, or, in default of the district's acceptance, a similar gift to the state university to establish an industrial school fund named after testator's son. *Held* that, the intention of the testator being to provide a "monument" or artificial structure for the purpose of preserving the memory of his son, the fraternal order was not entitled to the annual income of the estate in any event, but only so long as it maintained the home.

APPEAL from Second Judicial District Court, Washoe County; *R. C. Stoddard*, Judge.

In the Matter of the Estate of Otto Hartung, deceased. From an order denying motion by the Board of Regents of the University of Nevada for a new trial and from

Argument for Appellants

final decree of distribution, the Board of Regents appeals. **Affirmed.** Petition for rehearing denied.

Geo. B. Thatcher, Attorney-General, and *Hoyt, Gibbons & French*, for Appellants:

The decree of the lower court should be reversed and the necessary orders made to effect a modification of said decree so that it will be harmonious with the law, and it be ordered that the decree finally to be entered shall distribute the *corpus* of the estate to the board of regents of the University of Nevada, unless the school trustees of Reno shall, within the seven years allowed them by subdivision (B) of the tenth clause of the will of the testator, become entitled to the residuary estate of the testator by virtue of compliance with the provisions therein.

The bequest to the Independent Order of Odd Fellows of the State of Nevada was upon a condition precedent, and no legal right vested in said order until they had performed that condition. The condition precedent is thus set forth in the will:

"If within five years from the date of my death the said Independent Order of Odd Fellows of the State of Nevada, does establish a home worthy of its name, for orphans and foundlings near Reno, Nevada, and to be known by the name of the 'Royal D. Hartung Home for Orphans and Foundlings.' "

It is the contention of appellants that the Independent Order of Odd Fellows failed to comply with this condition precedent, in that it did not establish a home "worthy of its name" at any time or place, and that it never established a home "near" Reno.

The court will not ascribe to the well-known word "establish" a fanciful meaning, such as to inject into it the idea of "maintaining" an orphans' home. The requirement of the will would have been answered, so far as it purported to confer the income upon the order of Odd Fellows, when the home was created or brought into existence. (Words and Phrases, vol. 3, p. 2471.)

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The dominant intent of the testator was not the establishment of a home, but the establishment of a home worthy to be known as the "Royal D. Hartung Home for Orphans and Foundlings." This is made manifest by the language of the will; and to eliminate a part of the intent, to wit, that the home to be established should be worthy to be known as the "Royal D. Hartung Home for Orphans and Foundlings," is not to carry into force the intent of the testator. The testimony shows that the only home ever attempted to be established by the Independent Order of Odd Fellows, in compliance with the terms of the will, was the purchase for the sum of seven thousand dollars, paying four thousand dollars and giving a mortgage for three thousand dollars upon the property, of a twenty-five-year-old, ten-room, wooden dwelling-house, situated in one of the most populous residential districts of Reno; and the testimony shows, furthermore, the extreme difference and dissimilarity between the homes usually established by different fraternal and benevolent organizations, and this old dwelling-house, situated upon two city lots, fronting on the most popular driveway in the city of Reno.

The main intent of the testator was not to benefit the Independent Order of Odd Fellows, but to perpetuate the memory of Royal D. Hartung; and when he used the words "worthy of its name," he prescribed with certainty the value and character of the home to be established.

The home was established "in" Reno, not "near" Reno. The will of the testator provided that the home should be established "near" Reno. The two words are different; they are words of opposition. They are not words which are used by persons of ordinary understanding or education to express the same idea, especially in the drafting of a will. That the words have a different meaning was practically admitted by the lower court; but, as stated in the opinion, by the doctrine of *cy-pres*, he practically construed them as being synonymous. The lower court mistook the doctrine of *cy-pres* and its functions. The doctrine has never been held to excuse the performance of a condition precedent. (*Doyle v. Whalen*, 32 Atl. 1022,

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87 Me. 414, 21 L. R. A. 118.) Furthermore, this doctrine is brought into operation only when it is necessary to prevent intestacy. In the present case no intestacy would result.

The will contains no provision as to what the Odd Fellows shall do with the income. As they have the power to devote it to noncharitable purposes, the grant was void, and no assurance that it would be devoted to charitable purposes can be made to cure the infirmity. The grant was of the income to the Independent Order of Odd Fellows, without any direction whatsoever as to the manner in which the organization should expend it. It is plain that it could be expended for social entertainments, or the like. It cannot therefore be said to be a charitable bequest. There may be lawful charities under the rule against perpetuities. If section 1418 of the Revised Laws could be construed to have intended that the Odd Fellows can hold in perpetuity funds "for the necessary uses, purposes, and ceremonies of the order," such construction would make so much of it unconstitutional, because perpetuities are strictly by the constitution limited to eleemosynary purposes.

The devise and bequest perpetually places the residuary estate of the testator in the hands of trustees to pay a perpetual income to beneficiaries who are not qualified under the rule of perpetuities to become and to be the beneficiaries of such a gift, the said organization not being "a charity" within the law such as to qualify it to benefit by said devise and bequest. The will does not require the Independent Order of Odd Fellows to apply the income of the estate to the maintenance or support of a home for orphans and foundlings, nor make any other provision as to what the said organization shall do with the income, but merely bestows upon the organization the income of the estate if the condition has been complied with. The bequest is not, therefore, to a public charity, so as to be legal under the constitution, which provides that "no perpetuities shall be allowed, except for eleemosynary purposes." (Const. Nev., art. 15, sec. 4; *Troutman v. De Bossiere Odd Fellows' Home*, 64 Pac. 33, 71 Pac.

Argument for Respondent

286, 5 L. R. A. n.s. 695; *Pennoyer v. Wadhams*, 25 Pac. 722; *Burd Orphan Asylum v. School District*, 90 Pa. 29; *Philadelphia v. Masonic Club*, 160 Pa. 579; *Swift v. Beneficial Society*, 73 Pa. 362.)

There is no imperative duty to devote the money to charitable uses. (*In Re Sutro*, 102 Pac. 920; Perry on Trusts, vol. 2, secs. 711, 718; *Mason v. Perry*, 22 R. I. 475; *Fairfield v. Van Wyck's Exrs.*, 94 Va. 557; *Hadley v. Forsee*, 14 L. R. A. n. s. 49; *Goodale v. Mooney*, 60 N. H. 528; *Grimes v. Harmon*, 35 Ind. 198; *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 54 S. W. 200; *Nichols v. Allen*, 130 Mass. 211; *Gairfield v. Lawson*, 50 Conn. 501; *Johnson v. Johnson*, 92 Tenn. 559; *Hyde v. Hyde*, 64 N. J. Eq. 6; *Taylor v. Keep*, 2 Ill. App. 368; *Moseley v. Smiley*, 55 South. 143; *Hughes v. Daly*, 49 Conn. 34; *Tilden v. Green*, 130 N. Y. 29.)

Since the Independent Order of Odd Fellows is not a public charity, but an organization for the benefit and profit of its own members, the bequest to it is invalid. (Cases, 14 L. R. A. n. s. 68.)

In specifying alternative bequests, testator made careful provision for the expenditure of the income bestowed so that it should not in any event fail to accomplish his beneficent purpose and conserve the welfare of the public in general. (*Old South Society v. Crocker*, 119 Mass. 1, 20 Am. Rep. 200; *Babb v. Reed et al.*, 5 Rawl. 151, 28 Am. Dec. 650.)

Thomas E. Kepner and C. E. Mack, for Respondent:

Every condition of the bequest has been complied with. The Royal D. Hartung Home is an accomplished fact; it has been established, dedicated, and is being maintained. Testator required as a condition precedent that a home worthy of the name be established. The home has been established in strict accordance with the terms of the will.

The purpose of the testator was to establish a home for orphans and foundlings. It is too clear for argument that the will creates a good public charitable bequest, to

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the administration of which the courts will give all necessary aid. (*Sears v. Chapman*, 158 Mass. 400; *Attorney-General v. Briggs*, 164 Mass. 561, 42 N. E. 118; *Hadley v. Academy*, 14 Pick. 240, 253; *Society v. Harri-man*, 125 Mass. 321; *Davis v. Inhabitants*, 154 Mass. 224.)

Pursuant to the conditions named in the will, the Royal D. Hartung Home for Orphans and Foundlings has been established within the corporate limits of the city of Reno. It has been urged that the home, being established in the corporate limits of the city, is not "near" Reno. Testator did not define the location of the home. It might have been established anywhere within the jurisdictional limits of the respondent. No interpretation could be put upon the will that would make it imperative to establish the home "near" Reno, but not "in" Reno. "The word 'near' is of relative meaning, and its precise import can be determined only by surrounding facts and circumstances." (*Old Ladies' Home v. Hoffman*, 89 N. W. 1066; *Weeks v. Hobson*, 23 N. E. 215; *Fall River I. W. Co. v. Old Colony R. R. Co.*, 5 Allen, 221; *Barrett v. County Court*, 44 Mo. 197; *American D. & I. Co. v. The Trustees*, 29 N. J. Eq. 409; *Kirkbride v. Lafayette County*, 108 U. S. 208.)

By the Court, COLEMAN, J.:

This is an appeal by the board of regents of the University of Nevada from an order denying its motion for a new trial and from a final decree of distribution in the matter of the estate of Otto Hartung, deceased. This is the second appeal growing out of the construction of the will of Mr. Hartung, the former decision being reported in 39 Nev. 200, 155 Pac. 353.

The portions of the will necessary to an understanding of the questions involved read:

"Tenth, I give, devise and bequeath all the residue of my estate, both real and personal, as follows:

"(A) To the Independent Order of Odd Fellows of the State of Nevada the income from my estate to be paid over to them by my executors and trustees annually, if

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within five years from the date of my death the said Independent Order of Odd Fellows of the State of Nevada, does establish a home worthy of its name, for orphans and foundlings near Reno, Nevada, and to be known by the name of the 'Royal D. Hartung Home for Orphans and Foundlings,' but if the Independent Order of Odd Fellows of Nevada does not accept the provision of this bequest, within the time herein mentioned, then * * *

"(C) I give and bequeath all my estate, both real and personal not otherwise herein devised, to the board of regents of the State University of Nevada. * * *"

The lower court found that the Independent Order of Odd Fellows had established the home as contemplated by the terms of the will.

Appellant urges on this appeal: (1) That the Independent Order of Odd Fellows (hereinafter referred to as appellee) did not establish a home "worthy of its name"; (2) that the home, having been established within the corporate limits of Reno, was not a compliance with the terms of the will, which provided that it should be established "near" Reno; (3) that the devise and bequest to appellee offends against the common-law rule against perpetuities; and (4) that the bequest is void because no imperative duty is imposed upon appellee to devote the bequest to a charitable use. We will consider these questions in the order mentioned.

1. It is strenuously contended by counsel for appellant that the home established by appellee is not worthy of its name. It is urged that since the testator, by paragraph B of his will, required that the Reno school district erect a building to cost not less than \$25,000, in case it should acquire the property of testator, that it must be concluded that the testator had in mind that appellee should erect a home to cost equally as much. We are unable to adopt this view. It is to us evident at a glance that the testator did not have in mind that the home to be erected by appellee should cost \$25,000, for if so he would have specified the amount, as he did in

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paragraph B of his will. Having thought of requiring the school board to erect a building to cost \$25,000, it would have been the most natural thing in the world for the testator to have designated that amount as the cost price of the home had he had such an idea in his mind. The very words "worthy of its name" convince us that he had no such idea, for the reason that, having decided upon \$25,000 as the cost price of the school, and the ease with which he could have fixed a similar figure as the cost of the home had he so contemplated, he sought to express an entirely different idea, and used an expression which was evidently the result of mature reflection.

It is obvious that the testator meant to convey a distinct idea by the words which he used, and it is equally obvious that he intended that the appellee should be the judge as to whether or not the home established was "worthy of its name," subject to the right of the courts to finally determine the question. Taking this view, we must determine whether the home established by appellee is one worthy of its name.

2. Since the standard of everything is established by a comparison of it with other things, we must necessarily compare the home established with other similar homes; and we think, too, that it is only right in so doing to take into consideration the strength of appellee in Nevada, the population of the state, and the general conditions existing therein. Only one witness gave testimony relative to similar institutions in other states, and from his testimony the home in Reno, everything considered, compares very favorably with similar institutions elsewhere; and, in considering this testimony in connection with other testimony and the population of the state, we cannot say that the lower court was not justified in holding that the home in question is worthy of its name.

3. The next point urged is that appellee failed to comply with the terms of the will, in that the home

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which was established is "in" Reno, instead of "near" Reno. The will reads:

"If within five years from the date of my death the said Independent Order of Odd Fellows of the State of Nevada does establish a home worthy of its name, for orphans and foundlings near Reno, Nevada. * * *"

It is the contention of appellant that it was the intention of the testator, as expressed in the will, that a home for orphans and foundlings should be established, not within the corporate limits of the city of Reno, but "near" the city of Reno, and that the establishment of the home within the city limits was a failure to comply with the terms of the will, and hence that appellee had forfeited all claim to the property of the testator. On the other hand, it is claimed by appellee that by the language of the will the testator did not intend to designate the place where the home should be established, but that he intended that wherever the home should be established it should be for "orphans and foundlings near Reno."

We would do violence to no rule of construction we know of if, after a consideration of the language and punctuation of the clause in question, we should adopt the idea suggested by appellee; but we do not deem it necessary to determine this point, since, in the view we take, the judgment must be affirmed. All of the authorities hold that the word "near" is a relative term, but we are satisfied that as a general rule the word is used to designate a place slightly removed from a given point. Of course, there are exceptions to this rule; a notable one being the use of the word in diplomatic parlance as "near the Court of St. James." The real question, of course, is to ascertain the intention of the testator; and, as Mr. Dwaris says:

"Where the intention of the testator is clear and obvious, it has been held that it will control the legal operation even of technical words." (Dwaris, p. 176.)

"It is a familiar rule that the court will vary the strict

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meaning of words when necessary to effect the intention of the testator." (*Old Ladies' Home v. Hoffman*, 117 Iowa, 719, 89 N. W. 1067.)

The question is: What idea did the testator desire to express by the language used? As one who had been a member of the Independent Order of Odd Fellows for years, he, no doubt, knew that the jurisdiction of the Grand Lodge of the Independent Order of Odd Fellows took in the entire State of Nevada, and he knew that, unless he indicated some locality as the place where the home should be established, appellee could establish it at any place in the state, no matter how remote from the center of population; and, with this idea in mind, we are of opinion that by the language used he intended that the home should be established in the vicinity of Reno, which was his place of residence in his lifetime, the seat of the State University, the largest city in the state, and the center of population, rather than at some remote place. The court, in the case of *Old Ladies' Home v. Hoffman*, *supra*, had under consideration a case similar to the one at bar, in which the following language is used:

"It may be conceded that a condition precedent to the taking of a bequest must be literally performed, but the trouble in this case does not arise over the application of this rule. The difficulty here is to determine what the condition is; for, if the intent of the testator was to require her beneficiary to be located within the corporate limits of Muscatine, the defendants have no case. But was that her intention? Her primary purpose was to endow an orphans' asylum which should be connected with her home city. If none should be in existence at the end of five years from her death, her bequest was then to go to an old ladies' home located there. Her thoughts were first of all for the fatherless and motherless waifs of the community, and they were the primary objects of her bounty. Can it be said that she intended to deprive them of the great benefits to be derived therefrom simply because the home which should be provided for

them should be located just across a geographical line, though in fact recognized as one of the charitable institutions of the city she named? We think not. To us it is quite clear that she did not have in mind strict geographical lines, and that her sole purpose, as to locality, was to endow an institution which should be so clearly connected with her home city as to be recognized as a part thereof, and this is clearly the situation the defendant occupies."

We think that what was said in that case is peculiarly applicable to the case at bar, and we are satisfied that it was not the intention of the testator that those who selected the site for the home should search out the boundaries of the city of Reno to be sure that the home might be at least an inch outside of those boundaries, or forfeit its claim to the property bequeathed. Had the appellee placed the home one inch outside the corporate limits of the city of Reno, it would have been a compliance with the terms of the will, according to appellant's theory, notwithstanding the fact that at the very moment of its establishment a movement was under way to extend the city boundaries so as to take in the site of the home thus established.

4. Does the bequest offend against the common-law rule against perpetuities? We think not. It is not contended that a bequest to a public charity offends against this rule, either at common law or under our constitutional provision, but it is insisted that the bequest in question is not to a public charity. Appellant relies with great confidence upon the case of *Troutman v. Home*, 66 Kan. 1, 71 Pac. 286, to sustain its contention. Instead of sustaining appellant's contention, we think the case is authority to the contrary. In that case the testator bequeathed her property to "orphans of deceased Odd Fellows," while the testator in the case at bar left his property for "orphans and foundlings," without limitation to any particular orphans and foundlings. In that case the court quotes from a Pennsylvania case which clearly shows the distinction between the case at bar

and the Kansas case. The language quoted reads as follows:

“A public use, whether for all men or a class, is not one confined to privileged persons. The smallest street is public, for all have an equal right to travel on it; but a way used by thousands, which may be shut against a stranger, is private. Would Girard College be a public charity if the male children entitled to admission were limited to sons of deceased Masons or Odd Fellows? If Pennsylvania Hospital closed its gates to all but Methodists or Baptists having recent injuries, the people would not believe it a purely public charity in the intendment of their constitution. A charity for the poor of a parish or township is public; but not if confined to poor Presbyterians in the municipality. Public charities may be restricted to a class of the people of the state or of a municipal division; at the same time, they must be general for all of the class, within the particular municipality. ‘Thus a blind asylum is only for the blind in the community.’ If it be completely public, all the blind in that community are on an equal footing, and, should its capacity be insufficient for all, there is no mistaking justice in the order of admission. To open its doors only to the blind of a particular religious denomination, or of a beneficial association, or of a political party, shuts them against the public. A known and recognized class, though not generally poor, or diseased, or decrepit, may be the subject of a public charity, as sailors; yet, if the endowment were limited in its benefits to sailors who are members of a designated sect, there could hardly be two opinions of its character.”

The point is so clearly distinguished that we do not deem it necessary to elaborate.

5. It is also urged that the bequest is void because no imperative duty is imposed upon appellee to devote the money to a charitable use. We cannot accede to this construction of the will. Upon our former consideration of this will (*In Re Hartung's Estate, supra*) we held that

McCarran, J., concurring

the proceeds of the residue of the estate should go to appellee "so long as it maintained the home." We interpreted the will then to mean that such proceeds should be used in the maintenance of the home. From a reading of the will we can arrive at no other conclusion. If such had not been the intention, the testator would have bequeathed the property directly to appellee, instead of creating an active trust and directing that the proceeds be paid annually to appellee.

Perceiving no error in the record in this case, it is ordered that the judgment be affirmed.

NORCROSS, C. J.: I concur.

MCCARRAN, C. J., concurring:

I concur. As to the first proposition urged against the appellee, the Independent Order of Odd Fellows, to wit, that the home by that order established was not one "worthy of its name," as that expression was intended by the testator, it appears manifest to me that the expression thus used in the will was not one which was to constitute a measure of value estimable in dollars and cents, but, on the other hand, was an expression used by the testator in connection with and in the spirit of the object sought to be accomplished, namely, the establishment of a place for orphans and foundlings worthy of the name of home. If the reasoning is correct, the amount invested in the place established as a home was not the guiding motive or the uppermost thought of the testator; rather was it that the place when established should afford to those who were the recipients of its charity the protection, comfort, affection, and guidance contemplated by the word "home"; and, as I view the record and expressions made in the will, it may not be far-fetched to say that the expression "a home worthy of its name" may have emanated from the remembrance borne by the testator of the home, and protection, the affection, and guidance which he in his lifetime had

McCarran, J., concurring

given to his adopted boy, whose name, it was designated by the will, should be perpetuated by this establishment which the testator sought to support by the income from his estate.

The second proposition, that the home established by the Independent Order of Odd Fellows did not comply with the terms of the will, inasmuch as it is in fact "in Reno," rather than "near Reno," must be resolved in the light of the record before us, as well as from the expressions contained in the will, and from both we must as best we can arrive at the intention of the testator. The activities of his life were centered in and about Reno. The property the income of which was to be devoted to the support of the home he sought to have established was located in Reno. He had been in his lifetime an accumulator and creator of property within the city of Reno. It would appear as though his life's earnings and accumulation had been devoted, in a small degree, at least, to the upbuilding of that community. His adopted son, Royal D. Hartung, in honor of whose memory he sought to have this institution created, had been reared and had spent the years of his life with the testator within the city of Reno. It was a charitable institution that would perpetuate the name of Royal D. Hartung, one that by its nature would blend with the life of Royal D. Hartung, that the testator sought to have established. As it appears to me from the record here, the end sought to be accomplished by the testator was to endow an institution for orphans and foundlings, the existence of which should perpetuate the name of Royal D. Hartung within the community in which the life of the latter had been passed. It was, as I view it, the principle to be carried out in the locality designated that was uppermost in the mind of the testator, rather than the question of its technical position within or without the boundary lines of the city of Reno.

As to the third and fourth contentions, *i. e.*, that the devise and bequest offend against the law of perpetuities, and that the bequest is void because no imperative duty

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is imposed upon the appellee to devote the bequest to a charitable use, I think it unnecessary to emphasize the conclusion reached by Mr. Justice COLEMAN.

ON PETITION FOR REHEARING

By the Court, COLEMAN, J.:

Counsel for appellant have filed a petition for a rehearing. In the petition it is not contended that the court erred upon any points considered in the opinion, except the one last touched upon. After quoting from the opinion of the court, the petition says:

"In other words, the court has stated a conclusion which purports to be the interpretation of a will, arrived at by the discovery of the testator's intention, and we shall maintain that the court is in error and reached the conclusion by an erroneous path contrary to clear legal principles applicable to the subject."

Counsel then devote twenty-odd pages of their petition to a consideration of the law applicable to the question involved. A succinct statement of counsel's contention is contained in the following language of the petition:

"The court can indeed give effect to any intention of a testator which he has shown by the words that he has used, *even though it has not been articulated in formal language; but such an intention must appear from a perusal of the will.* (Italics ours.) It cannot be inferred from mere silence; much less can such an inference be founded upon bare conjecture as to what a testator would have said if he had foreseen the events which have happened since his death. We cannot speculate as to his intentions and make for him such a will as we may consider that he now, in view of the present circumstances, would have made."

1. We are in hearty accord with the views expressed, but we also think that we may take into consideration, in determining the question now before us, the subject-matter, the chief aim of the testator, and all the surrounding circumstances. We were guided by these

principles when we rendered the original opinion herein. We will now consider the question more at length.

2. The will, so far as it throws any light upon the question under consideration, reads as follows:

“Tenth, I give, devise and bequeath all the residue of my estate, both real and personal, as follows:

“(A) To the Independent Order of Odd Fellows of the State of Nevada the income from my estate to be paid over to them by my executors and trustees annually, if within five years from the date of my death the said Independent Order of Odd Fellows of the State of Nevada, does establish a home worthy of its name, for orphans and foundlings near Reno, Nevada, and to be known by the name of the ‘Royal D. Hartung Home for Orphans and Foundlings’ but if the Independent Order of Odd Fellows of Nevada does not accept the provision of this bequest, within the time herein mentioned, then—

“(B) I give and bequeath all my estate to the board of school trustees of Reno, Nevada, provided they will build and establish within the Reno school district an industrial school, the land and building to cost not less than twenty-five thousand (\$25,000) dollars. The cost of this land and the building shall be paid by the taxpayers of the Reno school district. The said school shall be known as the ‘Royal D. Hartung Industrial School,’ and my estate shall be excepting where already invested in safe, and good income-bearing bonds, reduced to cash and loaned out upon first-class real estate security, the income thereof to be considered as an annual endowment fund and the income thereof only to be expended annually by the board of trustees for the purpose of paying the teachers, or supplying facilities for instruction in the Royal D. Hartung Industrial School. If, after a reasonable time has elapsed not exceeding seven years after the date of my death, the city of Reno fails to accept the provisions of this bequest, then—

“(C) I give and bequeath all my estate, both real and personal not otherwise herein devised, to the board

of regents of the State University of Nevada, that my estate be reduced by them to cash, or good income-bearing securities, and loaned out upon first-class real estate security and the income thereof alone to be expended annually, or at such other period as such trustees may deem best in assisting poor, worthy students, of high moral character, in obtaining an industrial school or industrial college education in the city of Reno, and I expressly direct that the principal of said gift to said board of regents be kept intact and that the fund be kept a perpetual fund to be known as the 'Royal D. Hartung Industrial Education Fund.' * * *"
(*In Re Hartung's Estate*, 39 Nev. 200, 155 Pac. 353.)

In considering this will while before us in another contest, we said:

"It is apparent at a glance that the paramount purpose of the testator was the establishment and maintenance of a permanent monument to the memory of his son. So consumed was he with this idea and purpose, that he imposed three conditions in his will as an assurance that his wishes in this regard would be carried out. The medium through which he most desired the attainment of his aim was the Independent Order of Odd Fellows, for it was to that organization he offered the first inducement, as appears from paragraph 10 of his will. Should the organization named fail to avail itself of the opportunity offered, then the Reno school district or the state university, in turn, was to take the residue of the estate of the testator."
(*In Re Hartung's Estate*, *supra*.)

If our conclusion as thus expressed was correct, and we think it was, then we naturally ask: What is a monument? What are the sentiments which animate men in erecting them? These, we think, are legitimate questions of inquiry in this connection. A monument is nothing more or less than an artificial structure, brought into existence for the purpose of perpetuating the memory of some person or event. In this instance the

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testator sought to perpetuate the memory of his son, Royal D. Hartung.

We think no one would be so reckless in his statement as to say that the respondent, though having established a home as contemplated in his will, would be faithful to its trust if it were now to abandon the home thus established. If such a thing were done, the real purpose of the testator would be defeated. But the testator took the precaution to guard against such a consequence. In the first instance he imposed upon an organization, whose principal aim is to dispense charity, the erection and maintenance of the home. He imposed a trust in that organization, and he evidently had faith in its fidelity to its trust. But that the perpetuation of the monument which he sought to have erected might be assured, he did not leave the matter entirely to the good faith of that organization, but, as an additional guaranty that the trust which he imposed might be faithfully performed, he left his estate to trustees, with directions that they pay over to respondent annually the income therefrom.

It will be noted, from a reading of that portion of the will which we have quoted, that, no matter which of the institutions mentioned therein eventually became the beneficiary under the will, the income alone as it accrued annually could be used, showing clearly the purpose of the testator to keep intact the principal of the estate for all time.

We think that we are safe in saying that the beneficiary under paragraph A of the will is not entitled to the annual income from the estate in any event, but only so long as such beneficiary maintains the home. Then, if the consuming purpose of the testator was the erection and maintenance of the monument to his son, surely we cannot escape the conclusion that the testator intended the income to be used in the attainment of his consuming purpose. What else could have been his intention? We are at a loss to surmise.

It is ordered that the petition for rehearing be denied.

Argument for Respondent

[No. 2056]

**CÆSAR RAMELLI, RESPONDENT, v. NICK SORGI,
APPELLANT.**

[161 Pac. 717]

1. COSTS—ON APPEAL—COST BILL—TIME FOR FILING.

A cost bill, though not filed until after decision on rehearing, was filed in time.

2. COSTS—ON APPEAL—TRANSCRIPT.

In view of Rev. Laws, 5333, providing that when appellant specifies as ground for appeal that the judge erred in denying a motion for new trial on ground that the evidence did not support the judgment and does not prevail, he shall not recover costs for the statement of the testimony, although he prevails on other alleged errors on an appeal from the judgment and from an order denying a motion for a new trial, where the only relief granted appellant was on the appeal from the judgment based on the judgment roll alone, appellant is not entitled to costs for the transcript on appeal from the order denying his motion for a new trial.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Appeal, pursuant to rule, from the action of the clerk taxing costs of appeal. **Costs retaxed**, denying one item. [For opinion on former appeal, see 38 Nev. 552.]

Summerfield & Richards, for Respondent:

The rule providing for the serving and filing of a cost bill refers to the decision contemplated under the original opinion. Appellant failed to file any cost bill until after the opinion on rehearing was rendered, and this court did not disturb its decision announced in its original opinion. "The clear implication is that costs are in the discretion of the court only in the cases mentioned. No express provision is made for cases where the judgment is affirmed or where it is reversed with direction to enter a final judgment in favor of appellant. Such reversal or affirmance carries costs with it. Where a new trial is directed or the judgment is modified, the court, in its discretion, sometimes allows costs to the appellant, sometimes to the respondent, and sometimes to neither party; and sometimes, where the judgment is reversed, it is

Argument for Appellant

directed that costs of appeal abide the result of the court below." (Hayne, New Trial and Appeal, Ed. 1889.)

The appeal was from the judgment and order denying the motion for a new trial. Nearly the whole transcript embraces the testimony taken at the trial, and this naturally appertains to the facts of the case and not to the law. The opinions of the court are based absolutely upon the judgment roll alone. The appellant abandoned every question except those which could be raised upon the judgment roll alone, therefore rendering the testimony for which the costs are claimed an absolutely useless record on the appeal. The transcript was unnecessary. (*Halsey v. Murray*, 112 Ala. 185; *People v. Holden*, 28 Cal. 123; *Biglow v. Hoover*, 29 Am. St. Rep. 296; *Young v. State*, 60 Pac. 711; *King County v. Collins*, 1 Wash. Terr. 468.)

The costs under the statute and the decisions are discretionary, and on this appeal neither party should be awarded costs. (*Romberg v. McCormick*, 194 Ill. 205; *Metropolitan Co. v. Duggan*, 11 N. Y. Supp. 819; *Ramsey v. Ramsey*, 35 Ala. 282.)

Harwood & Springmeyer, for Appellant:

The allowance of costs as made by the clerk should stand. The language of the statute is plain and explicit, to the effect that "in the event no order is made by the court relative to the costs, * * * the party obtaining any relief shall have his costs." (Rev. Laws, 5381; Rules of Sup. Ct., rule 6.)

If appellant had filed a cost bill after the original decision, it is plain that he could not have included in it the item of costs for the petition on rehearing. Inasmuch as section 2 of rule 6 provides that the cost bill shall be filed within five days after a decision, and it was filed within that time after the decision on rehearing, appellant should receive his costs for the petition on rehearing and for all records used by the court in rendering that decision. The situation is analogous to a new trial in the district court, where a cost bill on the second

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trial includes and covers costs on the first trial. The authorities cited by respondent have no applicability to the principles involved.

By the Court, NORCROSS, C. J.:

1. Exceptions were taken to the cost bill filed in this case by counsel for appellant. The clerk has taxed the costs in accordance with the cost bill filed. Pursuant to a rule of this court, an appeal is taken from the action of the clerk. It is contended that the cost bill was not filed in time, because not filed until after decision upon rehearing. We think this objection is without merit. (*Argenti v. City of San Francisco*, 16 Cal. 277; *Cameron L. Co. v. Stack-Gibbs L. Co.*, 26 Idaho, 626, 144 Pac. 1114, 4 C. J. 641.)

2. Appeals were taken in this case from the judgment and from an order denying a motion for a new trial. (38 Nev. 552, 149 Pac. 71, 154 Pac. 73.) The only relief granted appellant was on the appeal from the judgment based on the judgment roll alone. We think appellant is not entitled to costs for the transcript on appeal from the order denying defendant's motion for a new trial. (Rev. Laws, 5333.)

The clerk is directed to strike from the cost bill so much of the allowance made for "typewriting transcript and statement on appeal," which is inclusive of the statement on appeal from the order denying the motion for new trial. All other items of the cost bill are allowed.

Argument for Respondent

[No. 2166]

FIRST NATIONAL BANK OF ELY (A CORPORATION),
RESPONDENT, v. W. E. MEYERS AND DORA
MEYERS, APPELLANTS.

[150 Pac. 308; 161 Pac. 929]

ON REHEARING

1. HOMESTEAD—ESTABLISHMENT—NOTICE TO THIRD PARTIES.

Occupancy by the family is *prima facie* evidence to third parties of the homestead nature of the premises.

2. HOMESTEAD—INTEREST OF WIFE—PROTECTION—"TO BE SELECTED."

Const., art. 4, sec. 30, declares that a homestead as provided by law shall be exempt from forced sale, and shall not be alienated without the joint consent of the husband and wife, and that laws shall be enacted providing for the recording of such homestead. Stats. 1864-65, c. 72, provides that a selected homestead shall be exempt from forced sale, and that the selection shall be made by recording intention in writing. Amending act, Stats. 1897, c. 20, provides that no deed or mortgage of a homestead, whether a declaration has been filed or not, shall be valid, unless both the husband and wife executed and acknowledged the same. *Held*, that although a homestead was not registered as required by law, the husband's sole conveyance or incumbrance of it did not affect the wife's right in the homestead, which could not be alienated unless the instrument was executed and given by both.

APPEAL from Ninth Judicial District Court, White Pine County; *Ben W. Coleman*, Judge.

On rehearing. Former opinion, reversing and remanding, **affirmed**. [For former opinion, see 39 Nev. 235.]

Chandler & Quayle, for Respondent:

The reasoning and decision of this court in the opinion filed is predicated in the right and power of the state legislature in 1897 to amend the early act of 1865 (Stats. 1864-65, p. 239)—an act passed pursuant to the constitution (sec. 31, art. 4)—in such a way as to restore to the laws of this state what has been called a *homestead de facto* as distinguished from a *homestead recorded as required by law*. In the course of that reasoning and in arriving at that conclusion, the court expressly recognizes that section 30, article 4, of the constitution, which provides that laws should be enacted for the recording of the

Argument for Respondent

homestead, and the succeeding constitutional section (sec. 31, art. 4), are of "coordinate force." Such is the view which we take and which we took in our briefs. These two sections are found in the constitution in immediate sequence and must be regarded as in *pari materia*.

Properly construed, section 30 of article 4 of the constitution makes a provision for recording a condition concurrent with any homestead legislation. In effect, the section says that a homestead shall be provided for by law, and shall be exempt from forced sale or from voluntary alienation without the joint consent of husband and wife, provided that:

1. It shall not be exempt from sale for taxes or for the payment of obligations contracted for its purchase or for the erection of improvements thereon.

2. It shall be subject to any process of law obtained by virtue of a lien given by the consent of both husband and wife.

3. Laws shall be enacted providing for its being recorded in the county where situated.

The language of the section taken as a whole shows that these three provisos or limitations were intended to qualify and restrict the homestead right which was to be "provided by law."

A command to the legislature to enact certain laws impliedly prohibits it from legislating on the subject in other particulars. (*Keller v. State*, 1 L. R. A. n. s. 489.) *A fortiori*, should such a command be regarded as prohibiting the legislature from so legislating as to nullify the very command and its purpose?

The Washington cases referred to in the opinion show no element analogous to the vital point in question here. No provision of the Washington constitution bearing upon the legislative power or duty in reference to homesteads appears, and the powers exercised by the Washington legislature there were such as were absolutely free if restriction or limitation imposed by any coordinate provision such as our constitutional homestead section furnishes in the case before this court.

Argument for Appellants

Anthony Jurich and Walker & Haight, for Appellants:

Sections 30 and 31, article 4, of the constitution cannot, as a matter of law, be regarded as being in *pari materia*. To be in *pari materia* statutes must relate to the same person or thing or class of persons or things. Of these statutes, one applies with equal force to the wife, the husband, or other head of the family, and pertains to property which may or may not belong to the community, or which may be the separate property of any one of them. On the other hand, the other section applies strictly to the wife, and to no other person, and pertains only to her separate property, and also to that held in common with her husband. (*State v. Putnam*, 111 Pac. 239; *Hamilton v. Rathbone*, 175 U. S. 414; *Utah National Bank v. Nelson*, 11 Pac. 907; 36 Cyc. 1147.) Statutes relating to different subjects cannot be in *pari materia*. (*State v. Wirt County*, 59 S. E. 889; *United States v. Colorado*, 157 Fed. 321; *State v. Gebhardt*, 44 N. E. 469; *Waterford Turnpike v. People*, 9 Bard. 161; *State v. Wirt County*, 59 S. E. 884; *Joyner v. Harris*, 72 S. E. 970; *Richardson v. Harmon*, 222 U. S. 96; *United States v. Stever*, 222 U. S. 167; *United States v. Munday*, 22 U. S. 175; *People v. Armstein*, 138 N. Y. S. 806.)

"The rule requiring statutes in *pari materia* to be construed together, cannot be invoked where the language of a statute is clear and unambiguous." (*Shaffer v. Burnett*, 77 N. E. 546; *Goodrich v. Russell*, 42 N. Y. 177; *In Re Bank*, 133 N. Y. S. 62; *People v. Tea Co.*, 178 Ill. App. 124.)

The purpose of section 31, article 4, of the constitution was to give the wife certain rights to which it was considered she was entitled. The legislature was commanded to carry out this by the passage of proper laws. The intent of the framers of a constitution, when ascertained, will prevail over any part of the law. (*Hawkins v. Filkins*, 24 Ark. 286; *Powell v. Sparkman*, 65 Pac. 503; *Bishop v. State*, 48 N. E. 1038; *McGregor v. Baylies*, 19 Iowa, 43; *People v. Potter*, 47 N. Y. 375; *Rasmussen v. Baker*, 50 Pac. 819.)

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Sections 30 and 31 are independent of each other. The presumption and legal intendment is that each and every clause in a written constitution has been inserted for some useful purpose. (*Mayre v. Heart*, 75 Cal. 291; *People v. Wright*, 6 Colo. 92; *State v. Barnes*, 3 South. 433; *Powell v. Packman*, 65 Pac. 503; *Tuttle v. National Bank*, 44 N. E. 984; *Rasmussen v. Baker*, 50 Pac. 819; *Richardson v. Treasure Hill M. Co.*, 65 Pac. 74; *People v. Potter*, 47 N. Y. 375; *Coffin v. Board*, 56 N. W. 567.)

Even if the two sections of the constitution were repugnant, the last in order would prevail. (*Quick v. White Water*, 7 Ind. 570.) In construing a constitution, the thing to be sought is the thing expressed. (*State v. Doron*, 5 Nev. 399; *State v. Irwin*, 5 Nev. 111.)

The home may be exempt under other statutes than the homestead law. (*Estate of David Walley*, 11 Nev. 260.)

By the Court, MCCARRAN, J.:

A rehearing was granted in this case on petition of respondent, in order that a full and complete argument might be presented to the court and in order that the members of the bar of this state, *amici curiæ*, might, in view of the importance of the question to be determined, make such contribution as they saw fit by way of oral argument or brief to assist the court in arriving at a final determination.

In our former consideration of the case (*First National Bank of Ely v. Meyers*, 39 Nev. 235, 150 Pac. 308) we dwelt at some length on the constitutional and statutory provisions which seemed to us applicable to the matter at bar. Hence it will be unnecessary for us to go extensively into the question here on rehearing.

Our constitution (section 30 of article 4) provides:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists."

If the constitutional provision terminated at this point, we apprehend there would be no serious question to

consider in the matter at bar. But it is the latter part of the section upon which this controversy in the main rests:

"And laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

It will be noted that this section of the constitution makes no attempt at describing, limiting, or qualifying either the character, class, or quantity of the property that shall constitute a homestead. Such is entirely left to future legislation.

So one thing is apparent without proceeding further, namely, that when this homestead contemplated by the provision of the statute is designated, limited, and fixed as to the character, class, and quantity of the property to be exempted, such homestead so designated, so described and so limited "shall not be alienated without the joint consent of husband and wife when that relation exists."

Pursuant to the direction of this section of the constitution, the legislature in 1865 passed an act which, as we take it, described, limited, and fixed the homestead contemplated by section 30 of article 14 of the constitution. It declared as to the property out of which the homestead might be created. It limited the amount of property in value that might be covered by the homestead, and thereby made exempt from forced sale, and in this respect specifically provided:

"The homestead, consisting of a quantity of land, together with the dwelling-house thereon, and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of the family, shall not be subject to forced sale on execution. * * * Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention, in writing, to claim the same as a homestead." (Stats. 1864-5, p. 225.)

The statute proceeds to prescribe what declaration shall be made where the party selecting is a married person

and where the party selecting is an unmarried person; that the declaration should be signed, "acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded."

The statute continues by declaring how the husband and wife shall hold after the declaration of homestead. If the property selected be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration. The statute then makes provision as to how the property shall be disposed of in the event of the death of one or the other of the spouses. The section of the statute makes provision for tenants in common making declaration of homestead rights upon their respective estates in land and the improvements thereon.

But a singular feature with reference to this statute enacted under the specific mandate of the constitution is that while it defines the homestead, fixes its value, prescribes the property, separate or community, from which the homestead may be selected, provides for the recording of the same, specifies that from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants, etc., it nowhere by any word or expression limits or prescribes or designates the rights of the respective parties to alienate or effect the disposal or incumbrance of the homestead so created. That the homestead "shall not be subject to forced sale on execution or any final process from any court" is all that is provided in the way of exemption.

In the case at bar it must be recalled that we are not dealing with the question of forced sale of a homestead under execution or by final process from a court for any debt or obligation. We are dealing exclusively with the right of one spouse to alienate a homestead without the joint consent of the other. We are dealing here solely with the question of the validity of an instrument made by the husband without the knowledge, consent, or acquiescence of the wife, by which instrument the former

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alienated, at least to the extent of a mortgage, the home which had been at all times and was then openly and notoriously occupied by and was the only place of abode for himself, his wife, and his family. The statute enacted by our legislature in 1865 with a view to carrying out the specific requisites of section 30 of article 4, for some reason best known to itself, studiously avoided mention or provision as to the rights of the respective parties to the homestead as regards alienation of the same.

Respondent contends that the homestead "as provided by law" mentioned in the constitution means the homestead as recorded, and that no homestead can become effective for any purpose unless the parties claiming the same shall have first recorded their declaration.

What is the object and purpose of selecting a homestead or recording a homestead declaration? It is fundamental that the aim of the law in this respect is to give notice to those who would extend credit or who by any process would become creditors, that the property described in the notice should not be looked to as security for the declarant's future indebtedness.

It has repeatedly been held by the courts in cases involving the matter of forced sale under execution that the words in a constitutional provision, such as found in ours, "to be selected," have no significance where there is actual occupancy, and the property in question does not exceed in value or quantity that prescribed as a maximum by the statute or constitution. (*Stephen-Putney Shoe Co. v. White et al.*, 172 Ala. 89, 55 South. 503, Ann. Cas. 1913C, 1278; *Pollak v. McNeil*, 100 Ala. 203, 13 South. 937; *Green v. Farrar*, 53 Iowa, 426, 5 N. W. 557; *Riggs v. Sterling*, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; *Barton v. Drake*, 21 Minn. 299; *Rogers v. Marsh*, 73 Mo. 64; *Peake v. Cameron*, 102 Mo. 568, 15 S. W. 70; *Hobson v. Huxtable*, 79 Neb. 334, 112 N. W. 658; *Kimball v. Salisbury*, 17 Utah, 381, 53 Pac. 1037; *Id.*, 19 Utah, 161, 56 Pac. 973; *Atherton v. Hughes*, 249 Ill. 317, 94 N. E. 546; *Thompson on Homesteads*, sec. 230.)

In the case of *Beecher v. Baldy*, 7 Mich. 488, the Supreme Court of Michigan, in dealing with a constitutional provision (Const. 1850, art. 16) wherein it was expressed that:

"Every homestead of not exceeding forty acres of land, and the dwelling-house thereon, and the appurtenances to be selected by the owner thereof, * * * not exceeding in value fifteen hundred dollars, shall be exempt from forced sale on execution or any other final process from a court, for any debt contracted after the adoption of this constitution"

—went at length into the subject; and this decision has been quoted from extensively and cited approvingly by nearly every other court that has had to do with the subject. Among the expressions put forth in the opinion we quote the following:

"Having already shown what description of homestead is exempt by the constitution, we proceed to, second, the question of its selection. In what cases is any actual selection necessary, except that which is evidenced by ownership and occupancy as a homestead, in order to bring it within the constitutional exemption? To answer this we must first settle the meaning of the phrase 'to be selected,' as used in the constitution. Now, whether we look to its derivation or its universal use, the term, 'to select,' signifies to choose, to take some particular part or number from a greater; to take by preference from among others; to pick out; to cull. The term 'selection' has never, we think, been used to express merely an election or option, whether to take anything or nothing; to insist upon or to waive a right. The purpose for which a selection of a homestead is required is exactly in accordance with this universal signification of the term. The obvious purpose for which the selection is required is only to identify and define the property to which the exemption applies, so as to distinguish that which is exempt from that which may be sold at the instance of creditors. The selection in question, therefore, necessarily implies a larger tract or a greater amount of real

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estate from which the selection is to be made, and it is only for such cases that the statute of 1848 has provided a mode of selection. Both that and the constitution are silent as to the election to claim a homestead at all, or to waive it altogether."

In the case of *Stephen-Putney Shoe Co. v. White*, *supra*, the Supreme Court of Alabama was confronted with a constitutional provision which, among other things, provided:

"Every homestead, not exceeding eighty acres," of land "and the dwelling and appurtenances thereon, to be selected by the owner thereof, * * * shall be exempt from sale on execution or any other" form of "process." (Const. Ala. 1901, sec. 205.)

Under this constitutional provision a statute had been enacted which among other things provided that:

"The homestead of every resident of this state, not exceeding one hundred sixty acres of land, and not exceeding two thousand dollars in value, * * * to be selected by the owner, * * * shall be exempted from levy and sale under execution, or other process, for [the collection of] debts contracted after April 23, 1873." (Acts 1876-77, p. 32, sec. 2.)

The term "to be selected," as used in the constitution of Alabama and in the statutory provision, was dwelt upon at length by the supreme court, and many of the decisions of other states, dealing with similar questions, were reviewed. Among other things, the court quoted approvingly from Thompson on Homesteads and Exemptions, sec. 652, to the effect that:

"It is a familiar maxim that the law does not require a person to do an impossible thing, or a vain thing. A necessary application of this maxim is that, where all the land which a debtor has embraces his family homestead, and is within the statutory area and value, he is not required, in order to save his right of homestead, to exercise an act of selection. * * * The exercise of such an act, under such circumstances, would not only be useless, but impossible."

We refer to the principle thus enunciated by these several authorities, not as decisive of the matter at bar, but rather as illustrative of a sound reason which we deem equally applicable to the question of selection and declaration as affecting right of husband and wife in the homestead premises.

We have already drawn attention to the fact that the statute of 1865, which defines the homestead and provides for the recordation of the same, makes no provision or intimation that selection or recordation are in any wise necessary to prevent alienation by one spouse without the joint consent of the other. When we stop to consider, it is not surprising that the legislature in its wisdom saw the uselessness of such a provision. One need but revert to the fact that recordation is for the purpose of giving notice to the world of the exemption of certain specific property from becoming security for obligations. But why should recorded notice be necessary as between husband and wife, who, occupying the premises, living together, perhaps beneath the very roof, perchance rearing a family therein, are fully aware of the nature and character of the premises? As between husband and wife occupying a given premises as a homestead, does any good reason occur why selection and recordation of the same should be necessary. As between these persons, would not such selection and recording be the "vain thing" unnecessary? The statutory provision of 1865 made no mention of alienation of the homestead premises being affected by the act of selection or declaration. The amendatory act of 1897, having to do with the rights of husband and wife, declared no more, indicated to no greater extent, and affected no greater limitation on the powers of the husband to alienate a homestead than did section 30 of article 4 of the constitution itself. This section of the constitution declared that "the homestead, as provided by law, should not be alienated without the joint consent of husband and wife." But the homestead which was by law thereafter provided was "to be selected," not with a view to affecting the powers of

alienation—because that specific matter is not mentioned in the statute—but rather to exempt the homestead so selected from forced sale under execution or any final process from any court for any debt or liability contracted. The homestead defined by the law of 1865—a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value five thousand dollars—was required to be selected and hence recorded in order to accomplish the only purpose mentioned by the statute of 1865—exemption from forced sale under execution. Where in the constitutional provision or in any of our statutory provisions on the subject is there to be found an expression indicating that the homestead provided by law must be declared and recorded in order that it “shall not be alienated without the joint consent of the husband and wife?”

1. Is it the recorded declaration of homestead that makes the premises exempt from alienation? The statute fails to answer. Is alienation prohibited only where the declaration of homestead has been recorded? If so, why was it not so provided in section 1 of the act of 1865 entitled “An act to exempt the homestead and other property from forced sale in certain cases?” What is there in section 1 of this act? What word or phrase or sentence is there in the section that implies, much less expressly declares, that it shall be effective to any extent as prohibiting alienation of the homestead by the husband, whether recorded or unrecorded? What is there about the statute from which we can draw even an inference that it was intended to affect the rights of husband and wife, and in the alienation of an occupied homestead who else can be affected, in view of the fact that the occupancy by the family is *prima facie* evidence to third parties of the homestead nature of the premises? (*Cook v. McChristian*, 4 Cal. 23; *Lubbock v. McMann*, 82 Cal. 226; *Larson v. Butts*, 22 Neb. 370; *Brichacek v. Brichacek*, 75 Neb. 417; *Hobson v. Huxtable*, *supra*.)

Respondent argues with great earnestness that the decision of this court in the case of *Child v. Singleton*,

15 Nev. 461, is decisive of the question at bar. But we are constrained to believe from the language of that decision that had the learned and eminent jurist who drafted the opinion been confronted with a statute such as that found in the amendatory act of 1897 a different conclusion would have been arrived at.

The amendatory act of 1897 provides:

"* * * No deed of conveyance, or mortgage, of a homestead as now defined by law regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate." (Stats. 1897, p. 24,)

This is in no wise repugnant to the statute of 1865, which was enacted to accomplish a different purpose, as its title indicates. The amendatory act of 1897 was a limitation to the dominance of the husband over the community property. It sought to accomplish a humane purpose, and in this it sought to do no more than was made manifest as being the spirit and intention of the framers of the organic law.

We are asked:

"If the recording is not an essential element of the homestead, what did the constitutional convention mean by saying that the legislature shall enact laws providing for the recording of the homestead, and why did the legislature so enact?"

We reply that the legislature did not, by any word or sentence, expression or inference, declare that the homestead should be recorded in order that alienation by one spouse without the consent of the other could not be effected. The statute says:

"The homestead * * * to be selected by the husband or wife, or either of them, * * * shall not be subject to forced sale."

"To be selected," in order to be exempt from forced sale, is the statutory direction. Nowhere does the statute in this respect say or infer that the term "to be selected"

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means to make inalienable by one spouse without the consent of the other. Selection, as we have already emphasized, is for the purpose of giving notice. What an idle thing it would be to say that the wife shall give notice to the husband by selecting, and hence recording, a declaration under oath, etc., that she claimed the roof over her head, acquired though it was by her efforts in conjunction with his, as a homestead. This they contend she must do in order to bring to his attention that the community property, "consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances," could not be alienated by him. In other words, if we harken to the contention supporting respondent, we shall say the wife must bring this selection to the attention of her husband by public recordation in order that he may be bound by the specific declaration found in section 30, article 4, of the organic law, which says, in no uncertain terms:

"The homestead as provided by law shall not be alienated without the joint consent of the husband and wife."

The law does not deal in absurdities.

Nor does the constitution require recording of the homestead as affecting the rights of husband and wife to alienate. The constitution says:

"Laws shall be enacted providing for the recording of such homestead." What homestead? The homestead "as provided by law."

The homestead contemplated was instituted by the law of 1865, and the homestead "provided by [that] law" was a homestead "consisting of a quantity of land, together with the dwelling-house thereon," and was required to be selected to effect one expressed purpose only—to be exempt from forced sale. If we say that the expression in the constitution, "provided by law," means a selected and recorded homestead, then the expression has no bearing on the right of alienation, because the homestead that was required "to be selected" and recorded only affects the exemption from forced sale under execution.

Under fundamental rules of construction we are bound to give effect to every statutory provision not repugnant to the organic law. No one will attempt to contend that under section 31, article 4, of our constitution, the legislature could not enact a law such as the amendatory act of 1897. This act was clearly within the mandate of the constitution providing that "laws shall be passed more clearly defining the rights of the wife," etc. If we say that the amendatory statute of 1897 is unconstitutional, then we must say that no law can be passed protecting the wife from the act of alienation of the homestead by the husband, unless she does the vain, idle, absurd thing—select and record, and thereby serve notice on her spouse.

In the case of *Ham v. Santa Rosa Bank*, 62 Cal. 134, 45 Am. Rep. 654, the court, dwelling on a peculiar statute of California, emphasized the words "the record of the declaration operates as a notice of selection to all the world." This is but a reannunciation of an old principle. It does not apply to our peculiar statute, because our statute says nothing as to selection or recordation as affecting the rights of the wife as against those of the husband. Recordation may be, and in fact is, necessary to give notice to all the world of the selection of the homestead to exempt it from forced sale under execution. But to exempt it from alienation by one spouse without the consent of the other, in the absence of specific constitutional or statutory provision, why should such be necessary? Neither the constitutional provision nor the statute law of California is the same as that in this jurisdiction on the subject of homestead rights or the rights of husband and wife in respect thereto. Hence the California decisions afford no assistance in the final question here.

2. The provision of the statute of 1865, "the homestead * * * shall not be subject to forced sale * * * except * * * for the payment of any mortgage thereon executed and given by both husband and wife," emphasizes, if anything, the very conclusion we draw

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here. It revives the spirit and intent of the framers of the law, as well as the writers of our constitution, that the wife's right in the homestead could not be alienated unless the instrument of alienation was "executed and given by both."

The occupancy of the premises by the Meyers family, consisting of the maker of the mortgage in question here, his wife and children, was at all times known to the respondent. Its character as a homestead in fact was a matter of common knowledge. The act of Meyers in making the mortgage of these premises without the cooperation of his wife was one prohibited by the spirit and letter of the constitution, as well as by the specific language of the statute of 1897. His act in mortgaging the premises was void.

Our opinion here, and the observations herein made, are to be understood as in connection with and in furtherance of our views as expressed in our former opinion. (*First National Bank of Ely v. Meyers*, 39 Nev. 235, 150 Pac. 308.)

The judgment is reversed. The case is remanded.
It is so ordered.

NORCROSS, C. J., concurring:

I concur in the judgment and order, and adhere to the views expressed in the former opinion of this court.

COLEMAN, J.:

As I presided at the trial of this case in the district court, I declined to participate in its consideration when it first demanded the attention of this court. I would be reluctant to file an opinion in the case, in any event; but in view of the importance of the question involved, may elect to do so at a later date.

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[No. 2161]

H. H. PORCH, PLAINTIFF-APPELLANT, v. J. C. PATTERSON, ANNIE B. PATTERSON AND GEORGE H. GREENFIELD, DEFENDANTS. ANNIE B. PATTERSON, DEFENDANT-RESPONDENT.

[156 Pac. 439; 161 Pac. 933]

APPEAL from Fourth Judicial District Court, Elko County; *E. J. L. Taber*, Judge.

On rehearing. Former opinion **affirmed**. [For former opinion, see 39 Nev. 251.]

By the Court, MCCARRAN, J.:

As was said in our former opinion in this case (*Porch v. Patterson*, 39 Nev. 251, 156 Pac. 439) the precise question involved in this case is also involved in the case of *First National Bank v. Meyers*, 39 Nev. 235, 150 Pac. 308. Having granted a rehearing in the last-named case, in view of the importance of the question presented, rehearing was also granted in this case.

Upon rehearing in the case of *First National Bank v. Meyers*, we affirmed our position taken on the occasion of its first consideration, reversing the judgment and remanding the case.

Upon the authority of that case, the judgment in this case will be affirmed.

It is so ordered.

NORCROSS, C. J.: I concur.

COLEMAN, J.:

As the order in this case follows that of *First National Bank of Ely v. Meyers* (39 Nev. 235, 150 Pac. 308), I may elect to file an opinion herein, as in the Meyers case, at a later date.

Argument for Appellants

[No. 2238]

IN THE MATTER OF THE ESTATE OF WILLIAM J.
GORDON, DECEASED.

[161 Pac. 717]

1. WILLS—SIGNATURE—STATUTE.

Under Stats. 1915, c. 35, providing that no will shall be valid unless it be in writing and signed by the testator or by some person in his presence and by his express direction, a signature to a will by having another aid or steady the hand of the testator, at his request, is valid, if the testator possessed testamentary capacity, was acting under no undue influence, and realized the force and effect of the provisions of the will he was signing.

2. WILLS — CONTEST — TESTAMENTARY CAPACITY — SUFFICIENCY OF EVIDENCE.

Evidence in a will contest, *held* to sustain a finding that, when the testator's aided signature was made, he did not know that the instrument he was signing contained provisions as to the distribution of his estate which he had formerly discussed with the draftsman, or ordered him to prepare.

3. APPEAL AND ERROR—FINDING—CONCLUSIVENESS.

Where there is a substantial conflict in the evidence on a material issue, the trial court's determination will not be disturbed, if it is supported by substantial evidence.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Will contest by Mrs. William J. Gordon, and William J. Gordon, Jr., minor heir of William J. Gordon, deceased, against Mary T. Dougherty. Order refusing to admit the will to probate, and contestees appeal. **Order affirmed** (COLEMAN, J., dissenting).

James T. Boyd and *Roy W. Stoddard*, for Appellants:

The lower court erred both in refusing to admit the will to probate and in refusing proponent a new trial. In view of the circumstances of this cause, and in view of the clearness with which every fact attending the signing of the will was brought out, and the court's statement as to the facts, there should be a direction to the lower court to admit the will to probate without further proceedings on the part of the proponent.

Upon a mere entry on a chart by the nurse, who was

Argument for Respondent

not even subpoenaed in the case, the court found that testator was insane when he signed the will. Even where it is shown that a person was confined in an insane asylum, suffering from settled insanity, when he signed his will, if the will was signed during a lucid interval, the court will sustain it. (40 Cyc. 1013, 1016.)

Mere mental vagaries during an illness, or delirium for days prior to the execution of a will, will not defeat the instrument if it be shown that at the time of its execution the testator was in his right mind. (40 Cyc. 1011.)

The court found that the scrawl at the end of the will was made by testator. If it could not do for his signature, certainly it was sufficient under our law for his mark, and must stand as his signature. (Rev. Laws, 3913, 6204; *In Re Will of Bridget Gilfoyle*, 22 L. R. A. 370.)

"The signature is not rendered invalid by the fact that another guided the hand of the testator when he signed the will. Such an act is the testator's own, performed with the assistance of another, and not the act of another done under the authority of the testator." (40 Cyc. 1104; *Jarman on Wills*, 5th ed. vol. 1, pp. 106-111; *Points v. Nier*, 157 Pac. 44; 30 Am. & Eng. Ency. Law, 2d ed. p. 584; *Sheehan v. Kearney*, 35 L. R. A. 102; *Plate's Estate*, 148 Pa. 55; *Watson v. Pipes*, 32 Miss. 466; *Cook v. Winchester*, 8 L. R. A. 299.)

Sardis Summerfield and *A. A. Heer*, for Respondent:

It is true that when once admitted to probate a will must be liberally construed in order to carry out the intention of the testator, but it is equally true that statutes providing the requisites for the execution of a will must be strictly construed in order that a court will not invade the province of the testator and execute a will for the testator himself. (*Estate of Seaman*, 146 Cal. 455, 2 Am. & Eng. Ann. Cas. 726; *Estate of Walker*, 110 Cal. 387; *Sears v. Sears*, 77 Ohio St. 104; *Gravil v. Barr*, 5 Pa. St. 441.)

By the uncontroverted testimony of those present, the

deceased was unable to write, and having made the "sprawl" remarked that he was too nervous, and requested his hand to be steadied. This being done, the guided legible signature was produced. The "sprawl" can have no effect, either as a mark or a signature, for the reason that it affirmatively appears from the testimony that it was not intended by the deceased to have that or any effect. (*Everhart v. Everhart*, 34 Fed. 85; *Plate's Estate*, 148 Pa. 55, Rev. Laws 3913.) "If the statute requires designated formalities, a compliance with such requirements is necessary, * * * but any formalities prescribed by statute in respect of such signing must be strictly complied with." (40 Cyc. 1103.)

As to the testamentary capacity of the testator at the time of the alleged execution of the purported will, this court, under the broad rule relating to the vacating of decisions, supported by unanimous authority, namely, that a decision will not be disturbed where there is any substantial evidence to support it, must, in the very nature of the settled law, decline to reverse the decision of the lower court in this regard. The citation of authorities on this point is unnecessary.

By the Court, MCCARRAN, J.:

William J. Gordon died on July 15, 1915. He was survived by a widow and by a minor heir, William J. Gordon, Jr. In an instrument purporting to be his last will and testament, after making small bequests of money to his wife, to his infant son, William J. Gordon, Jr., and to each of his sisters, he bequeathed the rest, residue, and remainder of his estate, of every kind and character, to one Mary T. Dougherty. An application to have this will probated resulted in a contest, at the inception of which the court appointed attorneys to represent the absent minor heir. The widow was represented in her individual capacity by other counsel.

The record in this case is voluminous. It will, however, we think, suffice to determine the principal point in the case upon a consideration of three propositions

considered by the trial court, and upon which that court, as a final conclusion, refused to admit the will to probate:

“First, did the deceased possess testamentary capacity at the time it is testified that he discussed the making of the will with the draftsman, some time prior to the date he was taken ill?

“Second, did the testator know, at the time it is testified to that the testator signed the will, that it was the instrument he discussed with the draftsman, or ordered him to prepare?

“Third, is the signature of the will the signature of the testator?

1. We shall approach the last proposition first, and in doing so we deem it sufficient to quote the words of the trial court, wherein we find presented a fair resume of the evidence. He says:

“The evidence tends to show that at the time of the alleged signing of the will the testator could hardly see; was seriously ill and very nervous; that in first attempting to sign the will, while propped up in bed, he made the sprawl, and upon one of the witnesses remarking that the signature was not very good, or words to that effect, the testator said, ‘I am too nervous,’ and requested one of the witnesses to steady his hand; that thereupon, and as testator was propped up in bed, the instrument in front of him on the magazine or cardboard, one of the witnesses proceeded to assist the testator to write his name in the manner following: He put his arm completely around the back of the testator, who held the pen, and in that position, with the witness guiding the hand of the testator, the legible signature William J. Gordon was made.”

The court determined that the signature thus made was rendered invalid, but with this conclusion we are not in accord. Our statute (Stats. 1915, p. 36) provides:

“No will * * * shall be valid, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested by

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at least two competent witnesses, subscribing their names to the will in the presence of the testator."

That a signature to a last will and testament is not rendered invalid by reason of another having aided the hand of the testator is supported by a line of eminent authorities. (*In Re Miller's Estate*, 37 Mont. 545, 97 Pac. 935; *Vines v. Clingfost*, 21 Ark. 309; *Craighead v. Martin*, 25 Minn. 41; *Fritz v. Turner*, 46 N. J. Eq. 515, 22 Atl. 125; *Sheehan v. Kearney*, 82 Miss. 688, 21 South. 41, 35 L. R. A. 102; *Jarman on Wills*, pp. 106-111.)

In order for this rule to apply, it must appear that the testator, at the time of requesting or receiving the aid in the signing of the instrument, had the present volition to affix the signature, and was aware and fully cognizant of the details of the instrument of will or testament to which he, by the aid of the other, was affixing his signature. The fact that the signature of the testator was made in the manner indicated by the record here would not of itself invalidate that signature. Hence we must decide—and we do this in the light of a harmonious line of authorities—that if the testator in this instance possessed testamentary capacity, was acting under no undue influence, realized the full force and effect of each and every one of the provisions of the will that he was signing, then the signature, in the manner in which it was made, as described by the trial judge, was a valid signature.

2, 3. We now take up the second question considered by the trial court, namely: Did the testator know, at the time at which his aided signature was made, that the instrument he was then signing contained the provisions as to the distribution of his estate which he formerly discussed with the draftsman, or ordered him to prepare? The record in this case presents a series of events in the later life of the testator, as well as a condition of mind and body, which must not be overlooked in arriving at a conclusion as to the proper answer to be made to this question.

The trial court which heard the evidence, saw the witnesses, and had opportunity to observe their manner,

conduct, and demeanor, had presented to it, as the record discloses, two sharply conflicting lines of evidence. The testimony of Dr. Hartzell, the physician who attended the decedent during his last illness, the testimony of Roy W. Stoddard, the attorney for the deceased and the draftsman of his will, as well as the testimony of the witness S. R. Tippet, each of the last-named witnesses being most reputable attorneys of splendid integrity, all tends strongly to establish that at the time of the signing of this instrument the deceased, Gordon, was of sound and disposing mind, and was fully aware of what he was doing. On the other hand, the record establishes a condition attendant in the testator, as well as surrounding circumstances, all of which, to say the least, appeared to lead to the catastrophe in his career relieved only by death. The deceased, up to a few months prior to the time of his death had resided in the Eastern States; he came to Nevada for the purpose of securing a divorce; he came here in company with the proponent of this will, the principal beneficiary under the instrument, Mary D. Dougherty, and her aunt, Mrs. Kramer; his wife, from whom he had been estranged, and six-year-old boy were in the Eastern States.

Prior to his coming to this state deceased had been in poor health, and his mental condition is described by his sister, Mrs. Pelton, where, in her deposition, she relates:

"Q. Will you describe your brother's physical condition as you saw it on that day (February 20, 1914)?

A. He was very sick; he was losing his sight; he could hardly see.

"Q. As regards your brother's ability to move, to walk freely, what was his appearance? A. It was very difficult for him to walk; he walked with a stick and was led to the door by some man. I don't know whether it was a nurse; he did not say. Some one was taking care of him."

On being further interrogated, she testified:

"Q. Did you talk with your brother at that time, Mrs. Pelton? A. I did.

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"Q. For how long were you in conversation with him?
A. About an hour.

"Q. As regards his coherence and ability to speak intelligently, what can you say? A. He could not speak intelligently; he could not make two sentences go together.

"Q. Now as regards his mental capacity, as shown by his conversation at that time, will you state what your opinion is? A. I do not think he was capable of doing anything; he did not know what he was doing.

"Q. As compared with his mental condition of prior years, Mrs. Pelton, can you make any comparison?
A. None whatever, because he hardly knew me.

"Q. Can you state whether he seemed stronger or weaker mentally than in previous years? A. Very much weaker.

"Q. Can you state whether or not he seemed to be under the immediate influence of say liquor at the time?
A. He appeared to be under the influence of something. I do not know whether it was drugs or liquor.

"Q. Did you see your brother again before he went West, Mrs. Pelton. A. Never."

In answer to further inquiry, we find as follows:

"Q. In reference to personal facts in your relations with your brother, was he accurate and clear in regard to his statements? A. Not at all.

"Q. And as to inferences of your brother upon such facts stated, was he rational in his statement of such opinions, or otherwise? A. Certainly not rational."

The testimony of the witness, Mary D. Hartzell, who prior to her marriage to Dr. Reine K. Hartzell on July 27, following the death of Gordon, was Mary D. Dougherty, and the party who, with her aunt, accompanied the deceased from Philadelphia to the city of Reno, is in part as follows:

"Q. Do you know what his (Gordon) primary object was in coming to Reno? A. He came on account of his health and to obtain a divorce.

"Q. Obtain a divorce? Before he left the East and

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came out here, did you or did you not have consultations with him with reference to his obtaining a divorce? A. Frequently.

“Q. In the presence of other people? A. Yes.

“Q. Sometimes in the absence of other people? A. I suppose so; I don't remember.

“Q. Who accompanied Mr. Gordon when he left the East and came to Reno? A. Mrs. Kramer, my aunt, and myself.

“Q. I wish you would state to the court, if you are able to say it, Mrs. Hartzell, why you accompanied Mr. Gordon to Reno? A. Because he was very ill; he had no one else to come with him, so he asked me if I would come, and I said if I could get Mrs. Kramer to come with me, I might be able to do so; so I came with him.”

On further inquiry the witness testified:

“Q. I wish you would state to the court, Mrs. Hartzell, whether there was any agreement or understanding, express or implied, between you and Mr. Gordon, before you left the East, that in the event he could obtain a divorce that you would become married. A. There was.

“Q. What? A. There was.

“Q. That agreement or understanding was before you left the East, if I understand you correctly? A. It was.”

Gordon, as appears from the record, arrived in Reno some time in the latter part of February or the first part of March, 1915. It appears that the decedent was more or less continuously under a doctor's care from the time of his arrival in Reno until his death; but it was not until the 20th of June, 1915, that he became confined to his room and to his bed. At that time, and from that date forward, he appears to have been continuously under the care of Dr. Reine K. Hartzell and three trained nurses. The testimony of Dr. Hartzell discloses a course of treatment attendant with the administration of most powerful drugs and medicines. The charts kept by the trained nurses, and admitted in evidence in this case in the trial court, disclose the mental as well as the physical condition of the decedent during the time from the 20th day

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of June until the 30th day of the same month, on which latter day the instrument here in question was signed. These charts disclose, among other things, the following notations made by the attendant nurses:

June 20, between the hours of 12 p. m. and 3: 20 a. m.: "Irrational."

June 21, 2 a. m.: "Talking irrationally."

June 22, 12 a. m.: "Rambling."

June 23, 3: 30 to 5: 45 a. m.: "Talking irrationally."

June 23, 6: 15 to 7: 30 p. m.: "Talking irrationally."

June 24, 1: 45 a. m.: "Talking irrationally."

June 24, 7 a. m.: "Talking irrationally."

June 25, 1 a. m. to 3 a. m.: "Restless, irrational."

June 25, 1 a. m. to 6 a. m.: "Very irrational and talked continuously."

June 25, 6 p. m.: "Irrational all day."

June 26, 2 a. m. to 6 a. m.: "Very irrational." "Irrational from 2 to 6 a. m."

June 27, 4 a. m.: "Irrational."

June 28, 3: 45 a. m.: "Talking irrationally."

June 28, 5:30 to 6 p. m.: "Very irrational all day."

June 30, 6 a. m.: "Very irrational."

It was between the hours of 5: 30 and 6 p. m. of June 30 that the will here in question was signed. There is no notation in the clinical chart of that day as to Gordon's condition at or about the hour at which the will was signed. Indeed, there is no notation of the doctor's visit, or of the visit of the party at that hour, although notations of the doctor's visits on other occasions, and at other hours of the same day, are much in evidence in the charts.

The testimony of Attorney Stoddard bears evidence of the affection held by the deceased for his six-year-old boy. The testimony of Mrs. Hartzell makes reference to this as well. In the copy of a letter written by Gordon to a party in the East, of date April 15, we find the following:

"As per our conversation you can see by my address that I have started a Nevada residence.

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"As to William, I will do as I said I would, but would like to have it arranged so that I could see him occasionally.

"I am getting a divorce on the grounds of desertion, which you know is true. If I had not been so ill for the past eight months, as you know, I would not have taken this step. I think you understand the situation thoroughly.

"Trusting that you and yours and dear little William are well, I am. * * *

In another letter to the same party, on April 27, the following appears:

"Your letter received as to my affairs and business relations and different connections, really I have nothing more to say. As per our conversation of recent date, please remember I will do as I have said as to William, also I will get a divorce after I have resided here six months. If you wish to contest any point of course, I am always willing to meet you as a gentleman."

The question before the lower court was as to the testamentary capacity of the deceased at the time at which he signed the instrument in which he practically disinherited his infant son. The condition of the testator on this occasion was a fact to be arrived at and determined. This court, as well as other courts of review, have repeatedly said that where, on a question vital to the issue, there is a substantial conflict in the evidence, the determination of the trial court will not be disturbed if the same is supported by substantial evidence. To say that there is no conflict of evidence here, to say that the decision of the lower court was not supported by substantial evidence, would be to disregard entirely the mental condition of the testator as indicated by the testimony and as evidenced by the clinical charts made by the trained nurses, who, as we must assume, used the terms found there advisedly. The physical weakness, and indeed the mental condition, of the decedent, was evidenced in no small degree by the pitiable scrawl found in the will, made by his own hand.

Norcross, C. J., concurring

With a weakened physical and mental condition which the record shows extended at least as far back as February 20 treated internally, hypodermically, intravenously with medicines of which in almost every instance arsenic was a component factor, he passed through successive days, from June 20 to June 30 when those in charge noted his conduct at intervals as "irrational." On the last-named date the deceased performed an act which, to say the least, had all of the elements of being unnatural, wherein he eliminated his infant son from substantial participation in his estate. In view of all this, as borne out by the record, we are unable to say that the decision of the trial court, wherein it determined that at the time of the signing of the will the testator did not know what he was signing, was not supported by substantial evidence.

It is not for us to say whether, if the matter was before us in the first instance, we would have arrived at the same decision as was arrived at by the lower court. The question before us as it is presented here on review, is whether there is in the record substantial evidence to support the determination of that court, in view of what we perceive to be a substantial conflict.

Counsel for appellant assign error to the action of the lower court in appointing certain attorneys to supersede others in representing the minor heir. If error, it was such as could scarcely be considered prejudicial to the interests of appellant in the matter so far as it has proceeded. We do not assume to determine the propriety of the action. The error, if such it be, might be properly considered if the matter involved the question of the allowance of fees, or other matters of similar import.

The order of the lower court in refusing to admit the will to probate must, as we view it, be affirmed.

It is so ordered.

NORCROSS, C. J., concurring:

I concur in the opinion and in the judgment and order. While the question of the capacity of the testator at the

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time of executing the will is an exceedingly close one, I think it cannot be said, as a matter of law, that the evidence is insufficient to support the judgment.

COLEMAN, J., dissenting:

I dissent.

By a great weight of authority in the United States, it is held that in a will contest the burden of proof rests upon the person asserting the lack of capacity of the testator to make the will. (40 Cyc. 1018.) Instead of the contestants having shown by a preponderance of the evidence that the testator lacked mental capacity to make a will, I think it can be said there is no evidence worthy of serious consideration tending to show lack of mental capacity at the time the will was executed. There were only three persons present when the will was executed—two lawyers and a doctor—and all three of them testified that the mind of the testator was clear. It is sought to overcome this testimony by evidence of his sister given as to his condition in February, 1915, when she was negotiating with him to purchase his interest in the estate of a deceased brother, and of his general ill health. His sister, Mrs. Pelton, testified:

“Q. The fact that he had told you that he had been in the hospital for his health, that his eyesight was defective, and that he desired to go West for his health, or words to that effect, and that he was in need of money, didn't impress you as being irrational, did it? A. That particular statement didn't.

“Q. Did any of those things I have mentioned? A. No.

“Q. As to those particular things he seemed to be rational? A. Yes.

“Q. Please state what he said on that occasion that indicated irrationality? A. He talked in a very irrational way.

“Q. What did he say? A. He said that his wife had left him, that he had this little boy that he wasn't allowed to see, that he was very unhappy, and that he had somebody who was very fond of him taking care of

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him; that he would like to go back to the West if he did not get well; he would like to go West, and asked me if I would help him go. He asked me to telephone him the next day, and I said I would. I did, and I could not get him. The next thing I knew he had gone West.

"Q. Will you be so kind, Mrs. Pelton, as to tell us what particular acts that you enumerated in your last answer impressed you as being irrational? A. In the first place, I could not get him on the telephone. He wanted money, and when he had a chance to get it he didn't telephone.

"Q. What acts and statements have you described? A. Do you mean in regard to his going away?

"Q. What particular things have you stated in that answer that impressed you as being irrational? A. Because one minute he wanted to go to the hospital, and the next he wanted to go away. He wanted to go back to his wife. That struck me as not to be natural. * * *

"Q. You said it was not the fact that he wished to raise money, but something about the way of selling it, that impressed you as irrational? A. I didn't think he should.

"Q. Why should he not have sold the interest. A. Because it should not have been sold out of the family. It struck me as an unnatural proceeding."

It appears from the testimony of this witness, as given in the opinion of the court and this dissent, that when she saw the testator he was under the influence of liquor or drugs. Most men are irrational when in that condition. But I submit that when her testimony on cross-examination, as quoted herein, is considered there is nothing to sustain the idea that the testator was insane at the time of the meeting of the testator and his sister; in fact, when boiled down, her testimony shows conclusively that she did not base her statement that the testator was irrational upon his appearance, words, and actions when she saw him in February, 1915, but upon the fact that he sold his interest in an estate out of the family—an incident which transpired after she saw him

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in Philadelphia. And this, too, notwithstanding the fact that in all probability he received more for it than she was willing to pay. It was a very insane thing to do, possibly; but we usually regard as rational an effort to get the most we can for property.

Testator arrived in Reno about April 1, 1915, and shortly thereafter had some correspondence with one Malcolm Chase, of Boston, who apparently was acting for Gordon's wife in which she sought to overthrow some transaction of Gordon's. In one of his letters Chase says:

" * * * I cannot see, now that he has paid you, that it makes any difference to you one way or the other."

What is this but an endeavor to influence Gordon to practically repudiate his transaction? In his reply, Gordon says:

" * * * I shall not permit nor be a party to any such dishonest scheme and am surprised and indignant to think that you would propose anything of the kind to me, for you know that I do not do that kind of business."

This letter was written from Reno May 27, 1915, three or four months after he had had the negotiations with his sister for the sale of the interest. Does this letter indicate a weak, incompetent mind? We can almost see the passion with which he wrote flashing from his eyes. I think this letter shows beyond question that testator's mind was not only clear, but vigorous, on May 27, 1915. The attorney who drafted the will was consulted about the making thereof and its proposed terms as early as April, and on numerous occasions up to the day of its execution, and all of the talk was upon the basis upon which it was finally executed. The learned trial judge found that the testator possessed a clear, sound mind when he talked over the making of the will with the attorney some time prior to its execution. In his written opinion, he asks this question:

"Did the testator possess testamentary capacity at the

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time, it is testified, that he discussed the making of a will with the draftsman, some time prior to the date when he was taken ill?"

In the opinion the court answers this question as follows:

"Considering all the evidence before it, the court answers the first question in the affirmative."

Before proceeding further, I will quote from the opinion of the trial judge. He said:

"After carefully considering the evidence, the court is unable to say that there was any fraud, conspiracy, or undue influence in the case."

In another place he uses this language:

"The evidence showed that the testator on several occasions discussed the proposition of making a will, with the attorney who drafted the instrument, and, on one occasion at least, in the presence of the principal legatee. It seems that the testator on that occasion was requested by the principal legatee to give the trust fund to the boy or minor child of the testator and the testator's wife, and his reply at that time was that the principal legatee could look after the boy."

Thus it will be seen, if we accept the views of the trial court (and on these points there is no dispute here), that some time prior to the execution of the will, the testator was of a sound mind, and that no fraud or undue influence was perpetrated or exerted to induce the making of the will which was executed. Upon the argument in this court it was stated by counsel for contestants (and not denied) that the estate was practically of no value.

With the finding of the trial judge that testator was sane at the time he discussed the making of the will before us, what, let us ask, is the evidence of insanity at the time of the execution of the will? None, unless it be general ill health, the terms of the will itself, and the charts. That mere general ill health is no ground to declare a will void is a rule of law which should require no citation of authority to sustain it, but for the

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general rule reference may be had to 40 Cyc. 1009. As I read the record in this case, the fact that the testator left his son only \$100 should not weigh for much in determining the mental condition of the testator. In the first place, he seems to have had no estate of any consequence; besides, his wife had deserted him five years before and taken the boy, and, so far as appears, the wife may have been amply able to support herself and son; and under all the circumstances surrounding their life—their respective means—he may have felt, and no doubt did feel, justified in leaving his son only \$100. There was no evidence as to the wife's financial condition, but the lack of evidence on this point is due to her voluntary action. She was in court in person and by attorney during the trial, when the attorney who was appointed by the court to represent the minor heir, apparently over the objection of the mother, stated that he would on the following day call as a witness testator's wife. When court opened the following morning, it was found that Mrs. Gordon did not occupy her accustomed chair. Upon request of counsel appointed by the court, a bench warrant was issued for her, and it developed that she had left the state the night before. Evidently she was not very anxious to aid in the contest made on the will; she was no doubt satisfied to support the son herself. In view of this circumstance, and of the apparent paucity of the estate, should we attach any particular significance to the fact that testator left only \$100 to his son? I think not.

As to the charts, they show just exactly what is noted upon them, and nothing more. If Mr. Gordon had been continuously irrational, it is apparent that no notations would have been made. It is evident that the notations were made for the purpose of showing just what his condition was at or about the time they were made. We do not make notes of the usual, but of the unusual. This is true of things generally, and any one who has had the

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least experience in a sick room knows this to be the practice. Furthermore, the undisputed and unquestioned testimony in this case shows clearly that the notations on the charts referred only to the hour when made. The last notation on the charts of the irrational condition of Mr. Gordon, as shown by the opinion of the court, was at 6 a. m., June 30. The fact is that the charts show the next notation of his having been irrational at 12 p. m., July 4. The will was executed at 5:30 p. m., June 30. Thus we see from the charts, the only record evidence in the case, that the testator was in normal mental condition at the time the will was executed; and this record evidence is corroborated by the undisputed testimony of three persons who were present at the time of the execution of the will; and it is shown by the evidence that the will which was executed was the will which testator outlined as the will he desired to make when talking over with his attorney its preparation at a time when the trial judge in his written opinion found Mr. Gordon to have been of sound mind.

I am clearly of the opinion that the order and judgment appealed from should be reversed.

Per Curiam (COLEMAN, J., dissenting):
Petition for rehearing denied.

Argument for Appellants

[No. 2224]

**VERDI LUMBER COMPANY (A CORPORATION),
RESPONDENT, v. M. B. BARTLETT AND MRS. M.
B. BARTLETT, HUSBAND AND WIFE, APPELLANTS.**

[161 Pac. 933]

1. MECHANICS' LIENS—NOTICE REPUDIATING LIABILITY—STATUTES.

Rev. Laws, 2213, provides for a lien, whether work is done or material furnished at the instance of the owner or his agent, and that every contractor, subcontractor, architect, builder, etc., in control shall be held to be the owner's agent. Section 2221 provides that every building or other improvement constructed with the knowledge of the owner shall be held to have been constructed at his instance, and his interest shall be subject to lien, unless within three days after he shall have obtained knowledge of the construction he shall give notice that he will not be responsible, by posting notice in writing on the land or building. Alterations were made on a building, and the contractors for the work with the owner ordered lumber. After work had been commenced, the owners posted a notice of nonliability. *Held*, that such notice could not affect the lien under section 2213, since section 2221 merely imposes an active duty upon the owner to repudiate liability for improvements made or materials furnished without his consent, and not to the case where the order is given by his agent.

2. STATUTES—CONSTRUCTION—HARMONIZING PARTS OF ACT.

Instead of construing one section of an act as repealing another section in part, courts rather seek to harmonize the different parts of the act, or different acts in *pari materia*, so as to enable them all to stand.

APPEAL from Fifth Judicial District Court, Nye County;
Mark R. Averill, Judge.

Action by the Verdi Lumber Company, a corporation, against M. B. Bartlett and wife. From a judgment for plaintiff, defendants appeal. **Judgment affirmed.**

P. M. Bowler, Geo. A. Bartlett, and Geo. B. Thatcher,
for Appellants:

The question presented was not as to the sufficiency of the posting, but whether under the statute, when work is done and material furnished at the instance of the owner, through a contractor, the property is liable, even though a notice of nonresponsibility be posted.

The sections of the statute involved (Rev. Laws, 2213, 2221) must be construed in *pari materia*. The owner,

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having posted timely notice, is in no manner responsible. One who sells material to a materialman can claim no lien therefor, as the statute makes no provision therefor. (*Roebeling Sons Co. v. Humboldt Electric L. Co.*, 112 Cal. 288; *Wilson v. Hind*, 113 Cal. 357.) A materialman is one who agrees to provide material, and who does furnish it. The one who provides the material for the contractor and materialman cannot, by the statute, be entitled to a lien; he is relegated to his action and the statutory remedy of attachment.

The posting of the nonresponsibility notice is matter of defense. "Such notice, if given, is matter of defense to be set up by defendant." (*West Coast L. Co. v. Newkirk*, 80 Cal. 277; *Fuguey v. Stickney*, 41 Cal. 583; *Moore v. Jackson*, 49 Cal. 109; *Phelps v. M. C. G. M. Co.*, 49 Cal. 339; *Harlan v. Stufflebeem*, 87 Cal. 508; *Evans v. Judson*, 120 Cal. 282; *Gould v. Wise*, 18 Nev. 253; *Rosina v. Trowbridge*, 20 Nev. 106; *Hines v. Miller*, 122 Cal. 518; *Wheaton v. Berg*, 52 N.W. 926; *Allen v. Rowe*, 23 Pac. 901; *T. & G. Trust Co. v. Wrenn*, 56 Pac. 273.)

If the structure or building, alteration or repair be done with the knowledge of the owner, he is responsible, unless by proper notice he disavow responsibility. (*Cross v. Tscharing*, 39 Pac. 540.) Thus showing availability of nonresponsibility notice. (*Cutler v. Streigel*, 30 Pac. 326.)

When materials are supplied to a contractor under an ordinary sale on credit, no lien is acquired therefor on the land of a person upon which the material is used. (*Wagner v. Darby*, 30 Pac. 475.) A person contracting to furnish material and construct a building is a materialman only. (*Wilson v. Hind*, 113 Cal. 357; *Darlington M. & L. Co. v. Lobitz*, 46 Pac. 482.)

A materialman who merely furnishes material to be used in a building is not a contractor or subcontractor, and cannot subject the property to liens in favor of the person from whom he, in the first instance, purchases the material. (*Pacific Rolling M. Co. v. Hamilton*, 61 Fed. 476; *Pacific Rolling Mill Co. v. Construction Co.*, 68 Fed.

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966; 20 Am. & Eng. Ency. Law, 336; *Horton v. Carlisle*, 2 Disn. 184.)

H. R. Cooke, for Respondent:

Where the owner of property contracts directly for the construction of improvements upon his property, work done or material furnished for the purpose is done for and furnished to the owner of the property. (Rev. Laws, 2213, 2215.)

It is the general rule that where a lease contains a provision authorizing the lessee to make improvements "by deducting the cost thereof from the rent, or where part of the consideration of the lease is the making by the lessee of improvements which become a part of the realty, or that the improvements made by the lessee shall revert to the owner, a mechanic's lien may attach to the property for work done or materials furnished, pursuant to a contract with the lessee." (27 Cyc. 58; *Kremer v. Walton*, 16 Wash. 139, 47 Pac. 238; *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383; *Whitcomb v. Gans*, 90 Ark. 469, 119 S. W. 676; *Potter v. Conley*, 83 Kan. 676, 112 Pac. 608; *Western Lumber Co. v. Merchants' Amusement Co.*, 13 Cal. App. 4, 108 Pac. 891; *Wallinder v. Weiss*, 119 Minn. 412, 138 N. W. 417; *Lumber Co. v. Nelson*, 71 Mo. App. 110; *Crandall v. Sorg*, 198 Ill. 48, 64 N. E. 769; *Jones v. Menke*, 168 N. Y. 61.)

In order that the owner's interest be subject to a lien, it is essential that he either contracted for the improvement, or else that it was done at his instance. His interest might be protected by the posting of a nonliability notice, "unless he required the improvements to be made." (*Wallinder v. Weiss*, 138 N. W. 417; *Shaw v. Spencer*, 107 Pac. 383; *Lumber Co. v. Nelson*, 71 Mo. App. 110.)

The nonliability notice was not posted within three days after appellants had knowledge of the intended construction. (Rev. Laws 2221; *Western Lumber Co. v. Merchants' Amusement Co.*, 108 Pac. 891.) Unless the

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owner bring himself squarely within the terms of the statute, he cannot effect exemption of his property. (*Rosina v. Troubridge*, 20 Nev. 106, 17 Pac. 751; *Santa Monica L. & M. Co. v. Hege*, 48 Pac. 69; *Evans v. Judson*, 52 Pac. 585.)

A contractor agreeing to construct a building and furnish material therefor is not a materialman. When a contractor undertakes to furnish material and labor, he simply means to inform the owner that the entire job complete will cost the sum agreed upon, and that the owner can deal with the contractor for the entire work. Persons furnishing material to the principal contractor are entitled to a lien therefor. (27 Cyc. 99; *City of Salem v. Lane & Bodley Co.*, 82 Am. St. Rep. 481; *Richmond v. Richmond*, 68 Fed. 105, 34 L. R. A. 625.)

By the Court, COLEMAN, J.:

This is an appeal from a judgment and decree of foreclosure of a mechanic's lien, entered in the district court in and for Nye County. Appellants, who were the owners of a certain lot, and a building situated thereon, in the town of Tonopah, entered into a contract with Kelleher & Kuhlman, on or about September 1, 1913, for the making of certain alterations and additions to the said building. Pursuant to the contract, the contractors were to furnish all materials necessary in the making of the alterations and additions. The respondent, the Verdi Lumber Company, furnished and delivered to the contractors, upon their request, at the property mentioned, certain lumber and other building material, which were used by the contractors in making the alterations and additions contemplated by the contract. The contractors having failed to pay for the lumber and material so purchased, the company filed its lien statement, and in due time brought this action to foreclose the same.

Section 1 of an act entitled "An act to secure liens to mechanics and others, and to repeal all other acts in relation thereto," approved March 2, 1875 (Stats. 1875, c. 64), being section 2213 of the Revised Laws of 1912, read s:

"Every person performing labor upon, or furnishing material of the value of five (5) dollars or more, to be used in the construction, alteration or repair of any building or other * * * structure, has a lien upon the same for the work or labor done or material furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; * * * and every contractor, subcontractor, architect, builder, or other persons, having charge or control of any * * * or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this chapter."

Section 9 of the same act reads as follows:

"Every building or other improvement mentioned in section 1 of this act, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situate thereon."

Several days after work had been commenced upon the property pursuant to the contract, a notice of nonliability, such as contemplated by said section 9, was posted upon the property by appellants.

Several reasons are urged why the judgment should be reversed; but, in the view which we take of the case, we deem it necessary to consider only one question, and that is, conceding that the notice of nonliability was posted in apt time, and in a conspicuous place, did it accomplish the purpose intended by it?

While appellants contend that they never became liable to respondent, because of the posting of the notice, respondent asserts that it was not the intention of the legislature that section 2221 should apply to a situation such as is here presented, upon the theory that, under section 2213, Kelleher & Kuhlman were the agents of appellants, and that the appellants were bound by the acts of their agents just as much as they would have been had they ordered the lumber and other supplies themselves, and that, if appellants had themselves ordered the materials, they could not have relieved the property from the liability by posting a notice of nonliability.

A clause similar to the last one in section 2213, *supra*, making "the contractor, subcontractor, architect, builder, or other person having charge of the work," the agent of the owner, is embodied in the mechanic's lien statutes of many of the states; and, so far as we have been able to find, the courts have uniformly given such language its plain and ordinary meaning, and have held that supplies and other materials ordered by persons in any of the named classes were proper to be secured by a lien, with the same force and effect as if ordered by the owner himself. In fact, the intention of the legislature in using the language making the contractor, etc., the owner's agent is so clear that the courts have not found it necessary to construe it very often.

1. If the language of section 2213, *supra*, is given its plain meaning, and if the principal is as much bound by the acts of his agent as if he had acted for himself, how can the mere posting of a notice, such as contemplated in section 2221, *supra*, by the owner of the property, relieve him of liability under circumstances such as are presented in the case at bar? To sustain appellants' contention, we must hold that in so far as the circumstances of this case are concerned, so much of section 2213, *supra*, as provides that the contractor, etc., is the agent of the owner is repealed by section 2221, *supra*. Courts do not favor any such consequence when it can be avoided, but rather seek to so harmonize the different parts of acts,

and different acts which are in *pari materia*, as to enable them all to stand. We are convinced that the legislature never intended by section 2221 to convey any such idea as contended for by appellants, for if it did, we would have the absurd situation of an owner of property being able to order supplies, directly or through a duly authorized agent, procure their delivery, and then, pursuant to the preconceived plan, post a nonliability notice and escape liability therefor. It ought to require no argument to refute such a preposterous contention.

But, fortunately, it has not been left for us to become pioneers in interpreting this statute, for similar questions have received the consideration of other courts. The most recent case in point is that of *Oregon Lumber & Fuel Co. v. Nolan*, 75 Or. 69, 143 Pac. 935, 146 Pac. 474. That was a case in which Nolan, the owner of a certain lot, gave a lease upon condition that the lessee should erect thereon a building, by the terms of which lease it was agreed that the lessee should not suffer any lien to be filed against the property. The lessee entered into a contract with a builder for the erection of a building upon the lot. During the erection of the building the contractor failed, and liens were filed. On the day following the commencement of the work of digging the foundation for the building, Nolan posted a nonliability notice. In the foreclosure suit he took substantially the same position as has been taken by appellants in this case. In passing upon Nolan's contention, the court said:

"The terms of the contract between himself [Nolan] and Blanchard [the lessee] required the latter, without any choice on his part, to construct a building. Although this stipulation was coupled with a lease and an option to purchase the premises, yet its legal effect is to make Blanchard a contractor for the erection of a building which, by the terms of the contract, was eventually to become the property of Nolan and to increase the value of his holdings. These conditions made Blanchard the statutory agent of Nolan within the scope of section 7416, L. O. L., so that one furnishing material or labor at the

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instance of such an agent for the erection of a building would be entitled to a lien on the realty on which it was situated if Nolan owned the fee. Under such circumstances the law imposed upon Nolan's property certain obligations to those who should furnish materials for the erection of the house at the instance of his statutory agent. Laborers and materialmen, covenanting with Blanchard either directly or through subcontractors, have rights in the premises arising by operation of law which Nolan and Blanchard cannot destroy by contract between themselves. Although each for himself could properly stipulate to waive the provisions of the statute in his own favor, yet without the consent of materialmen who are strangers to that contract, they cannot waive nor impair the rights which the law confers upon such claimants. (*Hume v. Seattle Dock Co.*, 68 Or. 477, 137 Pac. 752, 50 L. R. A. n. s. 123.) If Blanchard had been only a tenant of the premises, without any obligation on his part to erect a building, and under such circumstances had contracted for the erection of the structure, only his leasehold estate would have been primarily liable, under section 7417, L. O. L., for the materials and labor furnished. Yet even then the fee owned by Nolan also would have been liable under section 7419, if he knew of the work, unless he had given the notice mentioned therein, and this because there would then have been no contract to which Nolan was a party contemplating the compulsory erection of the building. This is in accordance with the principle, so often announced by this court, that to support a lien there must be some contractual relation, either directly or indirectly between the lien claimants and the holder of the realty interest sought to be charged. Here, however, Nolan himself has in unmistakable terms directly made an agreement with his contractor, Blanchard, to build the house. He holds out Blanchard to the world as the person having charge of the construction of a building on Nolan's land. He cannot repudiate any of the terms or conditions which the law itself visits upon such a convention

for the benefit of persons named in the statute. The distinction between cases where improvements are at the option of a tenant or mere acquiescence of the landlord, entailing no right to a lien when proper notices are given, and the other class of cases where the improvement is compulsory on the part of the tenant, making him a contractor with the landlord, with the consequence that liens may be claimed against the fee for materials or labor furnished, is clearly pointed out by Mr. Justice Dunbar in *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 59 Pac. 507, 75 Am. St. Rep. 862. See, also, *Hall v. Parker*, 94 Pa. 109; *Boyer v. Keller*, 258 Ill. 106, 101 N. E. 237, Ann. Cas. 1916B, 628; *Curtin-Clark Hdw. Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476; *Western Lumber & Mill Co. v. Merchants' Amusement Co.*, 13 Cal. App. 4, 108 Pac. 891; *Arctic Lbr. Co. v. Borden*, 211 Fed. 50, 127 C. C. A. 486."

See, also, *Warde v. Nolde*, 259 Mo. 285, 168 S. W. 596; *Western L. & M. Co. v. Merchants' Amusement Co.*, 13 Cal. App. 4, 108 Pac. 892.

2. We have quoted at some length from the case mentioned because it fully and clearly presents the views of the courts which have been called to pass upon the question involved, as well as our interpretation of the statute. We are clearly of the opinion that by section 2221, *supra*, it was not the intention of the legislature that an owner might exempt his property from a lien for materials furnished for improvements, alterations, or additions upon his property, no matter whether the materials were ordered by himself or by his legally constituted agent, but that it was the intention of the legislature that the owner might be enabled to exempt his property from a lien in cases where improvements were made by one who occupied a relationship to the owner pursuant to which the owner was not charged with knowledge that improvements were to be made at the time the relationship was created, but became aware of the making of improvements thereafter. Any other construction of the section in question would necessitate our holding that

section 2221 substantially repeals section 2213, so far as they are in conflict.

Section 2221 was not, in our opinion, intended to narrow the scope and effect of section 2213, but rather to give a lien in cases not covered by the latter section. In other words, section 2213 expressly provides that liens might be acquired where materials were furnished at the request of the owner or his legally constituted agent, while by section 2221 an active duty is imposed upon the owner to repudiate liability for improvements made or materials furnished without his consent, within three days after acquiring knowledge thereof, and by his failure to do so he is, in effect, estopped from denying the authority of his tenant, or other person authorizing the improvements, because of which the property must be held subject to a lien. No other construction can be given to section 2221 which will harmonize the two sections.

For the reasons given, it is ordered that the judgment appealed from be affirmed.

MCCARRAN, J.: I concur.

NORCROSS, C. J., did not participate.

Per Curiam:

Petition for rehearing denied.

[No. 2207]

BOARD OF COUNTY COMMISSIONERS OF NYE COUNTY, APPELLANT, v. HENRY SCHMIDT AND RUSSELL WILLIAMS, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE TONOPAH HARDWARE COMPANY, RESPONDENTS.

[157 Pac. 1073; 39 Nev. 456]

Per Curiam:

Rehearing in the above-entitled matter is hereby denied. (December 15, 1916.)

[No. 2200]

P. D. MCLEOD, RELATOR, v. THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF NYE, AND MARK R. AVERILL, JUDGE THEREOF, RESPONDENTS.

[157 Pac. 649; 39 Nev. 337]

Per Curiam:

Rehearing in the above-entitled matter is hereby denied. (December 29, 1916.)

REPORTS OF CASES
DETERMINED BY
THE SUPREME COURT
OF THE
STATE OF NEVADA

JANUARY TERM, 1917

[No. 2273]

EDNA T. EDDY, PETITIONER, *v.* THE STATE BOARD
OF EMBALMERS, RESPONDENTS.

[163 Pac. 245]

1. LICENSES—EMBALMER'S LICENSE—"SHALL."

As used in act approved February 20, 1909 (Rev. Laws, 4453). section 9, providing that the state board of embalmers shall recognize licenses issued in another state, and on presentation thereof shall issue the regular license to the holders, the word "shall" is not equivalent to "may," but is mandatory.

2. STATUTES—CONSTRUCTION—LEGISLATIVE INTENT.

The unambiguous language of a statute cannot be construed contrary to its clear meaning.

ORIGINAL PROCEEDING in *mandamus* by Edna T. Eddy against the State Board of Embalmers. **Writ issued.**

Young & Brown, for Petitioner:

The United States constitution and the constitution of the State of Nevada guarantee to every person the right to enjoy life, liberty and the pursuit of happiness. (*Marymont v. Banking Board*, 33 Nev. 330; *Davies v. McKeeby*, 5 Nev. 369; *State v. Stoutmeyer*, 7 Nev. 342.)

It is the duty of the respondents to issue the license to petitioner. (Rev. Laws, 4445-4459; *Humboldt County v.*

Argument for Respondents

Churchill County, 6 Nev. 30.) The wording of the statute is mandatory and imperative. The word "shall," as used in the statute, is always construed to mean "must." "The word 'shall' will always be construed to mean must when the rights of third parties or the interest of the public depends upon that construction being given it." (35 Cyc. 1421; *Dimpley v. Ford*, 2 Mont. 300; *People v. Sanitary Board*, 184 Ill. 597, 56 N. E. 953; *City of Madison v. Daley*, 58 Fed. 751; *Ex Parte Jordan*, 94 U. S. 248, 24 L. Ed. 123; *People v. Board of Assessors*, 39 N. Y. 81; *In Re Douglas*, 46 N. Y. 42; *Greater New York Athletic Club v. Wurster*, 43 N. Y. Supp. 703.)

Geo. B. Thatcher, Attorney-General, and E. T. Patrick, Deputy Attorney-General, for Respondents:

The word "shall," in section 9 of the act in question, is permissive only—not mandatory. It is controlled by the title of the act and by the provisions of sections 2 and 5 of the act itself, and therefore petitioner is not entitled to a recognition of her California license, and her petition should be denied.

The word "shall" herein is permissive and directory and not mandatory, and should be construed as "may," for the reason that a discretion is vested in the respondents, and for the further reason that its use in a mandatory sense might destroy the whole purpose, force and effect of the act itself. (*State v. Clark*, 2 Ala. 26; *State v. Grace*, 136 S. W. 670; *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348; *Borkheim v. Firemen's Fund Ins. Co.*, 38 Cal. 505; *Coke v. Los Angeles*, 164 Cal. 705; *City of Denver v. Londoner*, 33 Colo. 104; *Appeal of Donovan*, 40 Conn. 154; *Burns v. Henderson*, 20 Ill. 264; *Morrison v. State*, 181 Ind. 544; *Sisson v. Board*, 128 Iowa, 442; *Bank v. Lyman*, 59 Kan. 410; *Commissioners v. Meekins*, 50 Md. 28; *Suburban L. & P. Co. v. City of Boston*, 153 Mass. 200, 10 L. R. A. 497; *State v. Strait*, 94 Minn. 384; *Cason v. Cason*, 31 Miss. 578; *Kirman v. Powning*, 25 Nev. 378; *Dangberg v. Commissioners*, 27 Nev. 469; *In Re Lent*, 40 N. Y. Supp.

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570; *State v. West*, 3 Ohio St. 509; *Bosworth v. Smith*, 9 R. I. 67.)

The equitable construction of statutes is a construction which extends a statute to a like case not within the words of the statute, but within its purpose, or which prevents the operation of a statute upon a case within the words, but not within the purpose. (*Wilén v. Kelsey*, 3 Ga. 274; *Eyston v. Studd*, 75 Eng. R. P. 688.)

Closely allied to the doctrine of the equitable construction of statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit or reason of the law will prevail over the letter. (*Davis v. Thomas*, 154 Ala. 279; *Chandler v. Lee*, 1 Idaho, 349; *Wabash Railroad v. Binkert*, 106 Ill. 298; *Gray v. Cumberland County*, 83 Me. 429; *Perry v. Strawbridge*, 209 Mo. 621; *Mendles v. Danish*, 74 N. J. L. 333; *People v. Lacombe*, 99 N. Y. 43.)

Words may accordingly be rejected and substituted, even though the effect is to make portions of the statute entirely inoperative. (*Pond v. Maddox*, 38 Cal. 572; *Farmers' Bank v. Hale*, 59 N. Y. 53.) The meaning of general terms may be restrained by the spirit or reason of the statute. (*Moss v. U. S.*, 29 App. Cas. 188.) General language may be construed to admit implied exceptions. (*Kelley v. Killourey*, 81 Conn. 320; *Plumley v. Birge*, 124 Mass. 57; *Peck v. Williams*, 24 R. I. 582.) Every statute must be construed with reference to the object intended to be accomplished by it. (*Dekells v. People*, 44 Colo. 525; *People v. Sholem*, 238 Ill. 203; *Chesapeake Canal Co. v. Baltimore R. R. Co.*, 4 Gill & J.; *Keith v. Guinney*, 1 Or. 364.) The statute should be given that construction which is best calculated to advance its object. (*Greenough v. Police Commissioners*, 29 R. I. 410; *United States v. Jackson*, 143 Fed. 783; *Maynard v. Johnson*, 2 Nev. 25.) It is a cardinal rule of construction of statutes that effect is to be given, if possible, to every word, clause, and sentence. (*Hawkins v. Railroad*, 145 Ala. 385; *Denver v. Campbell*, 33 Colo. 162; *People v. Sholem*,

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87 N. E. 390; *In Re Kilby Bank*, 23 Pick. 93; *James v. Dubois*, 16 N. J. L. 285.)

It is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious and give a sensible and intelligent effect to each. (*Stump v. Hornback*, 94 Mo. 26; *Morris Railroad Co. v. Commissioner*, 37 N. J. L. 228; *State v. Burr*, 16 N. D. 581; *Lawson v. Tripp*, 33 Utah, 28.) That construction of a statute is to be avoided which is liable to produce a public mischief or to promote injustice. Language, however strong, must yield to what appears to be the intention; and that is to be found, not in the words of the particular section alone, but by comparing it with other parts or provisions of the general scheme of which it is a part. (*Hayden v. Pierce*, 144 N. Y. 516.)

A literal reading of section 9 of the law perhaps sustains petitioner's contention. However, such literal interpretation violates both the spirit and intent of the act and renders nugatory several of its provisions. Its title shows it was enacted "to provide for the better protection of life and health," and "to prevent the spread of infectious and contagious diseases in the state."

By the Court, COLEMAN, J.:

This is an original proceeding in *mandamus*, wherein petitioner seeks to compel the respondents, as members of the State Board of Embalmers, to issue to her a license to practice the profession or art of embalming.

It is alleged in the petition that petitioner is a resident of the State of Nevada, and that on the 2d day of October, 1916, the board of examiners of the state board of embalmers of the State of California, after submitting petitioner to a rigid written examination, issued to her a license to practice the profession or art of embalming in the State of California, pursuant to "An act to establish a state board of embalmers, defining the duties thereof, providing for the better protection of life and health, preventing the spread of contagious disease, regulating the practice of embalming in connection with the care

and disposition of the dead and providing penalties for the violation thereof," approved April 16, 1915 (Stats. Cal. 1915, p. 80); that petitioner applied to respondents for a license to practice the profession or art of embalming in the State of Nevada, and tendered respondents the necessary fee therefor, but that respondents refused, and still refuse, to issue such license to her as requested.

To this petition a demurrer was filed, upon the ground that the petition did not state facts sufficient to entitle petitioner to the relief demanded. Later, and without waiving the demurrer, respondents filed an answer to the petition, in which certain issues of fact were raised. But since on the oral argument, as stated in respondents' brief, "it was virtually conceded that the decision in this case would turn upon the meaning of the word 'shall' in the first line of section 9" of "An act to establish a state board of embalmers," etc., approved February 20, 1909 (Stats. 1909, p. 26; Rev. Laws, 4453), we will consider this matter upon the demurrer, as though no answer had been filed.

Section 9, above referred to, reads as follows:

"The state board of embalmers shall recognize licenses issued previous to the passage of this act, or at any other time by other state boards of embalmers, and state health authorities, and upon presentation of such licenses shall issue the regular license to holders of such license and certificate of competency."

It is the contention of respondents that the word "shall" should be construed to mean "may," and that when so construed it is in their discretion, pursuant to the rules adopted by them, to decline to issue a license when requested so to do, when such request is based upon an embalmer's license from the State of California.

A long list of authorities is cited in which the word "shall" was construed to mean "may." Counsel for petitioner cites as many or more cases in which the courts have held the word "shall" to be mandatory. Whether or not the word "shall" should be construed to be mandatory or directory depends upon the intention of the

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legislature in incorporating section 9 in the act, as such purpose may be gathered from the whole statute.

1. It is the contention of respondents that since, under our statute, all applicants for licenses, except those falling within the terms of section 9, are required to pass a rigid written examination and make actual demonstration on cadaver, section 9 should be so construed as not to require the respondents to issue a license to an applicant holding a license from the State of California where, as it is contended, the passing of such a rigid examination is not a condition precedent to the obtaining of a license. Why should we presume that the legislature intended that such an interpretation should be placed upon section 9? If such had been the intention of the legislature we think it could have made that idea clear by the use of about six or eight words more than it did in section 9.

2. When the legislature uses plain ordinary language, which clearly expresses a definite idea, we do not know why the courts should go out of their way to so construe the language used as to convey a different meaning. We are of the opinion that by section 9 the legislature simply intended to follow the rule of comity which exists between the various states in many matters of a similar character. If this was the real purpose of the legislature, it is plain that the writ applied for should issue.

The writ will issue as prayed for.

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[No. 2196]

**IN THE MATTER OF THE PETITION FOR DISBARMENT OF
E. E. WINTERS, ATTORNEY AT LAW.**

[163 Pac. 244]

1. ATTORNEY AND CLIENT—PROCEEDINGS FOR DISBARMENT—EVIDENCE.

In a proceeding for the disbarment of an attorney, evidence that an affidavit of service of summons in a divorce suit, in which plaintiff was represented by respondent, associated with another, was altered after it was made so as to show a valid service is insufficient, as against the positive sworn denial of the attorney, to show that he made the alteration.

ORIGINAL PETITION for disbarment of E. E. Winters, attorney at law. **Proceeding dismissed.**

By the Court, COLEMAN, J.:

Petition for the disbarment of E. E. Winters, an attorney at law, was filed by a committee appointed by the Nevada Bar Association. The petition alleges that on June 6, 1912, an action for divorce was commenced in the district court in and for Churchill County, Nevada, wherein Helen Heisel was plaintiff and P. E. Heisel was defendant; that respondent appeared as attorney for the plaintiff in said action, and that on the day of the commencement of said action an affidavit showing the nonresidence of the defendant, was filed, but that no order of publication of summons was ever made, based upon the affidavit filed on that day. It is also alleged in said petition as follows:

"That on the 6th day of March, 1913, a second affidavit for publication of summons, which affidavit was dated March 4, 1913, was filed in said action, and thereafter, to wit, on the 25th day of March, 1913, an order for publication of summons was issued and filed in said action; that on the 10th day of May, 1913, there was filed in said action the original summons issued therein, to which was attached the affidavit of A. J. Laird, a citizen of the United States over the age of 21 years, that he received the said summons on March 26, 1913, and served the same on said March 26, 1913, on the defendant at Fresno, Cal.; that on the face of said affidavit it was sworn to on the said 26th day of March, 1913, before M. C. Gallaher,

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a notary public in and for the county of Fresno, State of California; that on the 10th day of May, 1913, a default was signed by the clerk of the court wherein said action was pending, which default recites, among other things, that, whereas it appears that service of summons was had on the defendant on the 26th day of March, 1913, on the 12th day of May, 1913, the defendant appeared specially in said mentioned action, and filed a motion to set aside the alleged service of summons on the ground that the said summons was served on the defendant at Fresno, Cal., on the 6th day of March, 1913, and that no order for publication had been previously made for the service of said summons; that the order for publication of summons was made on March 25, 1913, and that no service had been made upon the defendant subsequent to the making of said order; that your petitioners are informed and believe, and therefore allege as a fact, that after the execution of the said affidavit of the service of summons, and after the same had come into his possession, the said E. E. Winters altered and changed said affidavit so that said affidavit would read that service was made on the defendant on the 26th day of March, 1913, when in truth and in fact the said service was made on said defendant on the 6th day of March, 1913. Your petitioners further allege that such change and alteration of the said return on said summons by the said E. E. Winters was unprofessional conduct."

Respondent filed a verified answer to the petition, denying that he had altered or changed the affidavits of service in any way whatsoever.

The evidence shows that two attorneys were associated in the prosecution of the divorce action mentioned; and, while it appears from the evidence that the summons in the case was served only once, and that only one proof of the service of the summons was made by the sheriff at Fresno, Cal., and that to show that the summons was served on March 6, 1913, the proof of service on file in the office of the clerk of the district court in the divorce action shows that the service was made on March 26, 1913,

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instead of March 6, the date of the actual service as shown by the testimony in the proceedings.

It is the theory of the petitioner that the proof of service was changed by writing a "2" in front of the "6th" in the return which was in fact prepared and made by the sheriff of Fresno County; and, while no direct evidence was offered to show that the change mentioned was made by respondent, it is contended that, as he was in the active management of the case of the plaintiff, it follows that he made the change as alleged in the petition.

While we think it safe to say that the evidence showed the change in the proof of service, as contended, there is a lack of proof going to show that the respondent was responsible for the change, or in fact knew of it. Against the circumstantial evidence of the prosecution is the positive testimony of respondent. When we consider the fact that another attorney was interested in the case, the former good repute of respondent and his positive testimony that he did not make the change or know of it, we think the evidence insufficient to sustain the charge.

The disbarment of an attorney is a matter of serious consequence. It not only results in placing a stigma upon him for life, but when of the age of respondent it deprives him of the means of earning a living for himself and his family in the calling in which he is trained, and for which presumably he is best fitted, and therefore a serious charge should not be sustained upon mere suspicion. We believe that the good name of the profession must be maintained and that those guilty of professional misconduct should suffer the consequences, but the rights of an attorney must not be sacrificed in an effort to maintain the high standing of the bar.

At the conclusion of the evidence in this proceeding, after a conference between the members of the court, an order was made dismissing the proceeding for want of sufficient evidence to sustain the charge.

Argument for Petitioner

[No. 2268]

IN THE MATTER OF THE APPLICATION OF A. G. CRANE
FOR A WRIT OF HABEAS CORPUS.

[163 Pac. 246]

1. INDICTMENT AND INFORMATION—SURPLUSAGE.

In view of Rev. Laws, 7052, providing that evidence tending to prove charge need not be stated in the indictment, such allegations will be rejected as mere surplusage.

2. INDICTMENT AND INFORMATION—STATEMENT OF OFFENSE.

Whether the offense charged be a felony or misdemeanor is to be determined by the indictment's statement of facts and language employed.

3. FALSE PRETENSES—BY OFFICER OF CORPORATION—INDICTMENT.

Indictment charging the president of an insurance corporation with obtaining money by selling stock under false pretenses stated a felony under Rev. Laws, 6704, defining crime of obtaining money under false pretenses, and not a misdemeanor, under section 1174, prohibiting officer of any corporation from making false representations, the fact that the accused received the money as president being immaterial.

4. FALSE PRETENSES—STATUTORY PROVISIONS.

General Incorporation Laws, sec. 73 (Rev. Laws, 1174), making it a misdemeanor for officer of any corporation to make false representations, does not affect the crime of obtaining money under false pretenses defined by Rev. Laws, 6704.

5. HABEAS CORPUS—GROUNDS FOR RELIEF—DEFECTS IN INDICTMENT.

Defendant, convicted of obtaining money under false pretenses, having had objections to indictment overruled, was protected by his remedy of appeal and *habeas corpus* for his discharge would not lie.

APPLICATION by A. G. Crane for writ of *habeas corpus*.
Application denied.

Augustus Tilden, for Petitioner:

The petitioner should be restored to his liberty, for the reason that the indictment does not state facts sufficient to constitute a public offense; and if such indictment does state facts sufficient to constitute a public offense, the same was and is a misdemeanor, of which the justice court has and had exclusive jurisdiction, and of which neither the grand jury nor the district court had or has jurisdiction. (Rev. Laws, 1174, 6704, 7179.)

Where there is a general statute covering a crime, as in

Argument for Respondent

this case of false pretenses, and a specific statute covering the crime of false pretense committed either by particular persons in particular capacities or in certain other circumstances, the particular statute acts as a repeal *pro tanto* of the general statute; and where the legislature, by a subsequent act, makes penal an act which heretofore has been penal and punishes that act by either a greater or a less degree of imprisonment or fine, the two acts are deemed to be irreconcilably repugnant. (*State v. Smith*, 44 Tex. 443; *Gorman v. Hammond*, 28 Ga. 85; *Hayes v. State*, 55 Ind. 99; *Leighton v. Walker*, 9 N. H. 59.)

Geo. B. Thatcher, Attorney-General, and *Thos. E. Powell*, District Attorney of Humboldt County, for Respondent:

There is no irreconcilable, or any, conflict between sections 1174 and 6704, Revised Laws. All of the elements of obtaining money by false pretenses, as set forth in section 6704, are alleged in the indictment. "If there be two affirmative statutes, or two affirmative sections of the same statute, on the same subject, both must stand, if possible, and neither be deemed to repeal the other." (*Bruce v. Schuyler*, 46 Am. Dec. 447.) "Where there is a general act creating and punishing an offense which may be committed in a number of ways, and another statute prescribing a particular punishment for that offense when committed in a particular manner, such offense, unless committed in such particular manner, is subject to punishment under the general act." (*Haynes v. Territory*, 13 Pac. 8; *People v. Kinney*, 67 N. W. 1089; *Parkinson v. State*, 74 Am. Dec. 522; *New England C. S. Co. v. Baltimore R. R. Co.*, 69 Am. Dec. 181; *Sprague v. Birdsall*, 2 Cow. 419; *State v. Benjamin*, 2 Or. 125; *Sikes v. People*, 2 L. R. A. 461.)

Since section 1174 does not apply to the case, it is immaterial whether or not the defendants, Crane and Dunbar, acted individually or as officers of the corporation, although we contend that they did act as individuals. (*Commonwealth v. Jeffries*, 83 Am. Dec. 712.)

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By the Court, SANDERS, J.:

This is an original proceeding in *habeas corpus*.

The petitioner, A. G. Crane, was jointly indicted with H. H. Dunbar by the grand jury of Humboldt County for the crime of obtaining money by false pretenses. In execution of judgment and sentence he was committed to the custody of the sheriff of Humboldt County, and now asks his release by a writ of *habeas corpus*. In his petition he alleges that his imprisonment and restraint are illegal in this:

"That said indictment does not state facts sufficient to constitute a public offense. That if said indictment states facts sufficient to constitute a public offense the same was and is a misdemeanor of which the justice's court had and has exclusive jurisdiction, and of which neither said grand jury nor the said district court had or has jurisdiction." It is also stated in said petition:

"That petitioner has not first applied to said district court for such writ for the reason that the objections to said indictment hereinabove specified were presented to said district court in the course of petitioner's said trial, upon an objection made by petitioner to the admission of any evidence under said indictment, and was by the said court passed upon and overruled."

1. The indictment is quite lengthy and contains more than is necessary to state the offense sought to be charged, and more by way of description of the offense than is required by the statute (Rev. Laws, 6704).

"The indictment must be direct and contain * * * the particular facts of the offense charged so far as necessary to constitute a complete offense, but the evidence tending to prove the charge need not be stated." (Rev. Laws, 7052.)

"As the law does not require the superfluous circumstances to be alleged, so, although they have been improvidently stated, the law, in furtherance of its object, will reject them as mere surplusage, and will no more regard them than if they had not been alleged at all." (Starkie on Ev. 9th ed. 569.)

Applying this rule, and eliminating from the indictment all useless and redundant matter, and considering the averments together, and their legal effect, the indictment states a public offense.

2. Whether the offense charged be a felony or a misdemeanor is to be determined by the statement of the facts constituting the offense and the language employed. (*State v. Anderson*, 3 Nev. 254.)

3. Counsel for petitioner claims that the indictment shows the transaction complained of to be between A. G. Crane, president, and H. H. Dunbar, general manager, of the Interstate Life Insurance Company of Nevada, a corporation, and the prosecutrix, Lena Scott, and further shows that in the course of the transaction, in order to induce the prosecutrix to become a shareholder in the company, the said Crane and Dunbar jointly and severally made certain false statements, known to be false, of and concerning the affairs, status, and financial condition of the said corporation. It is urged that the offense thus stated comes within the purview of section 73 of the general incorporation law, being section 1174, Revised Laws, and is therefore punishable as a misdemeanor. Section 73 is as follows:

"Any person who, being a director, manager or officer of any corporation or body corporate or company, shall make, circulate or publish, or concur in making, circulating or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of any such body corporate, corporation or company, or with intent to induce any person to become a shareholder therein, or to intrust or advance any property to such body corporate, corporation or company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor."

The argument is an ingenious and plausible construction of the legally essential descriptive matter of the offense, but the gravamen of the charge is:

That the petitioner "knowingly and designedly, with

the intent to cheat and defraud one Lena Scott, falsely represent, pretend, and state to the said Lena Scott, * * * and the said Lena Scott, believing the said false statements to be true, * * * and being deceived thereby, was induced by reason thereof to then and there pay, deliver and pay to the petitioner, as president of said company, her check for \$1,000 in payment for fifty shares of the capital stock of said corporation."

This is the offense which the statute (Rev. Laws, 6704) aims to prevent. The fact that the petitioner received and obtained possession of the money of the prosecutrix in his capacity as president of the said corporation, and that the said false statements were made in the course of his employment as such officer, is immaterial.

"Inasmuch as a man cannot ordinarily commit a crime in any particular capacity, or in the exercise of any special occupation, it does not change or in any way affect the nature of the charge to aver that when he was committing it he purported or claimed to act, or actually did act, in a specific capacity, or by virtue of a certain employment." (*Commonwealth v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 724.)

4. No such result, as claimed by counsel for petitioner, was intended by the enactment of section 73 of the general incorporation law, nor does the section change or in any manner affect the nature of the crime of obtaining property by false pretenses, as charged in the indictment, and defined by section 6704, Revised Laws.

5. If the petitioner feels himself aggrieved by the court's overruling his numerous objections to the sufficiency of the indictment, his remedy is by appeal, and is ample for his protection. (*Ex Parte Smith*, 2 Nev. 338; *Ex Parte Winston*, 9 Nev. 71; *Ex Parte Maxwell*, 11 Nev. 428; *Ex Parte Gafford*, 25 Nev. 101, 57 Pac. 484, 83 Am. St. Rep. 568; *Ex Parte Breckenridge*, 34 Nev. 275, 118 Pac. 687; Ann. Cas. 1914B, 871.)

The application for the discharge of the petitioner is denied.

It is so ordered.

Argument for Respondent

[No. 2269]

G. M. GARDNER, RESPONDENT, v. PACIFIC POWER COMPANY (A CORPORATION), APPELLANT.

[163 Pac. 731]

1. APPEAL AND ERROR — ASSIGNMENT OF ERRORS — LATE FILING — STRIKING.

Motion to strike assignment of errors, not filed in the time prescribed by Stats. 1915, c. 142, sec. 13, and no memorandum of errors being served on respondent pursuant to Rev. Laws, 5322, is well taken.

2. APPEAL AND ERROR — BRIEFS — AFFIRMANCE.

Motion to affirm, copy of transcript of record not being served on respondent, as required by Supreme Court Rule 25, par. 3, and appellant's points and authorities or brief not being filed and served in the time provided by Rule 11, is well taken.

APPEAL from Eighth Judicial District Court, Churchill County; *T. C. Hart*, Judge.

Action by G. M. Gardner against the Pacific Power Company. From an adverse order, defendant appeals. Assignment of errors stricken, and order **affirmed**.

Geo. A. Bartlett and *Geo. B. Thatcher*, for Appellant.

B. F. Curler and *A. L. Haight*, for Respondent:

Pursuant to notice duly given, respondent asks this court for an order to strike out the purported assignment of errors. Said assignment, as a whole, is not properly before this court, and should be stricken. (Stats. 1915, p. 166; Rev. Laws, 5322, 5330.)

Respondent also asks for an order affirming the order of the district court denying the motion of defendant for a new trial, and affirming the judgment of the district court. Appellant failed to serve and file its brief, or to serve a copy of the transcript of the record, within the prescribed time, or at all. For failure of appellant to file brief, the judgment of the district court should be affirmed. (*Mathewson v. Boyle*, 16 Pac. 434.) By the terms of subd. 3, rule 25, of this court, the appellant is required to serve a copy of the transcript of the record upon each opposite party who appeared separately in the court below. "If appellant fails to serve a copy of the

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record or other papers within the time and in the manner required, his appeal will ordinarily be dismissed on motion as a penalty for the delay, or the judgment may be affirmed as to a party not served." (4 C. J. 482.)

By the Court, COLEMAN, J.:

This is an appeal from an order denying a motion for a new trial.

1. The appeal was taken April 25, 1916. On June 24, 1916, appellant filed with the clerk of this court its assignment of errors; but, so far as appears of record, no service thereof was made upon the adverse party. Respondent, in apt time, moved to strike out the assignments of errors, upon two grounds: First, for the reason that it was not filed within the time provided by section 13, c. 142, p. 166, Statutes of 1915; and, second, for the reason that no memorandum of errors was served upon the respondent in the action, as required by section 5322 of the Revised Laws.

2. Respondent also, in apt time, made a motion that the order appealed from be affirmed for the reasons: First, that a copy of the transcript of the record was not served upon the respondent in the action, or upon his attorney, as required by paragraph 3 of rule 25 of this court; and, second, that appellant did not file and serve his points and authorities, or brief, within the time provided by rule 11 of this court.

Counsel for respondent filed his brief in support of his said motions, and time was allowed counsel for appellant in which to file his brief in reply thereto, and the matter was set down for oral argument. At the time set for the oral argument of the motions mentioned, counsel for the respondent appeared. No appearance was made for appellant. Counsel for respondent called the court's attention to the fact that no brief had been filed by counsel for appellant, and urged that the case stand submitted on his motions and brief; and, no good cause appearing why such should not be the order, an order was entered accordingly.

Points decided

We are of the opinion that the motions are well taken. Neither of the requirements mentioned was complied with by appellant. We do not deem it necessary to enter upon a discussion of the case. The court has in numerous instances affirmed judgments for failure to comply with the rules of the court in regard to the filing of briefs. (*McLeod v. Lee*, 14 Nev. 103, 28 Pac. 124; *Goodhue v. Shedd*, 17 Nev. 140, 30 Pac. 695; *Mathewson v. Boyle*, 20 Nev. 88, 16 Pac. 434; *State v. Myatt*, 10 Nev. 163; *Linnville v. Clark*, 30 Nev. 113, 93 Pac. 231; 2 Cyc. 1023.)

It is ordered that the assignment of errors filed herein be stricken from the files, and that the order appealed from be affirmed.

[No. 2253]

MARY BELLE H. COFFIN, RESPONDENT, v. JOHN ROBERTS COFFIN, APPELLANT.

[163 Pac. 731]

1. APPEAL AND ERROR—ASSIGNMENT OF ERRORS—TIME FOR FILING—STATUTE—CONSTRUCTION.

Stats. 1915, c. 142, sec. 13, providing that assignments of error shall be served on the adverse parties and filed with the clerk of the supreme court within twenty days after an appeal has been taken, and that if not so filed no error shall be considered, is peremptory and leaves no room for construction, so that, if the assignment be not filed within the time limited, the omission may not be cured by a subsequent filing, in the absence of fraud, bad faith, or deception on the part of respondent.

2. APPEAL AND ERROR—CONSTITUTIONAL RIGHT OF APPEAL—STATUTE—CONSTRUCTION.

Stats. 1915, c. 142, sec. 13, requiring assignments of error to be served and filed within twenty days, does not deprive an appellant of his constitutional right of appeal, since while the constitution gives the right of appeal, and the legislature, under the pretense of prescribing forms, cannot deprive parties of substantial rights, the constitutional right of appeal is to be enjoyed and exercised subject to the regulations of law and practices of the court.

3. APPEAL AND ERROR—ASSIGNMENT OF ERROR.

An assignment of errors is founded upon the bill of exceptions.

APPEAL from Second Judicial District Court, Washoe County; *R. C. Stoddard*, Judge.

Argument for Respondent

Suit for divorce by Mary Belle H. Coffin against John Roberts Coffin. Judgment for plaintiff, motion for new trial denied, and defendant appeals. **Motion to dismiss appeal sustained.**

Summerfield & Richards, for Appellants:

The construction of the provision in regard to the filing and serving of the assignment of errors must be one that will cover every situation which may arise thereunder. The court will not construe the statute to apply specifically to this case, and in another case, under different circumstances, make a further construction. Obviously, the intention of the statute is that the assignment of errors must be filed and served within twenty days after an appeal is taken by the filing of the record in this court. (Stats. 1915, p. 164.)

"The right of appeal is favored by the law, and it will not be held to have been waived except upon clear and decisive grounds; and where a judgment or decree involves distinct or severable matters or demands, a waiver or estoppel as to only one will not prevent an appeal as to the residue." (3 C. J. sec. 535.) "But in order to bar the right of appeal on the ground of acquiescence, the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be unconditional, voluntary, and absolute." (3 C. J. 536.)

Hoyt, Gibbons & French, for Respondent:

The appeal should be dismissed, or an order should be entered affirming the judgment and order of the district court, for the reason that appellant did not comply with the requirement of the statute by filing his assignment of errors and serving the same within twenty days after the appeal was taken; and for the further reason that appellant has accepted the benefits of the judgment appealed from in so far as said judgment is favorable to him, and has complied with all the terms of the decree in so far as it imposed burdens upon him, and he is thereby estopped from taking this appeal or further prosecuting

the same, or in any way attacking the validity of the judgment appealed from in any particular whatsoever. (*McKain v. Mullen*, 29 L. R. A. n. s. 1.)

By the Court, SANDERS, J.:

This appeal was taken on the 19th day of June, 1916, from a judgment and order of the district court of the Second judicial district of the State of Nevada, in and for the county of Washoe, granting respondent a decree of divorce from appellant, and denying appellant's motion for a new trial. Respondent, on the 14th day of October, 1916, filed with the clerk of this court a notice of motion for an order dismissing the appeal or affirming the judgment and order appealed from. So much of the notice of said motion as is pertinent is as follows:

"That said appellant did not within twenty (20) days after his appeal herein had been taken serve the party adverse to the appellant herein, to wit, the said respondent, or file with the clerk of this court an assignment of errors or any assignment of errors whatsoever, but on the contrary served and filed said assignment of errors herein on the 12th day of September, 1916, whereas the said appeal of appellant herein had been taken and perfected herein on the 19th day of June, 1916. * * *

The motion came on to be heard on the date fixed for the argument of this cause on its merits. After argument the motion was submitted on the affidavit and counter affidavits of counsel for the respective parties without briefs.

This court has not heretofore had occasion to pass upon the effect of a failure to serve and file with the clerk of this court an assignment of errors within the time limited by section 13 of an act approved March 16, 1915 (Stats. 1915, p. 166). The section is as follows:

"Within twenty (20) days after any appeal has been taken from any order or judgment, the party or parties appealing shall serve the adverse parties and file with the clerk of the supreme court an assignment of errors, which assignment shall designate generally each separate error,

specifying the page and lines of the record wherein the same may be found. Any error not assigned shall not be considered by the supreme court. If the party fails to file such assignment within the time limited, no error shall be considered by the supreme court. The assignment of errors herein provided for shall be typewritten, paged, and the lines numbered, and the appellant shall furnish three copies thereof for filing in the supreme court."

By this section of the statute, assignment of errors is made an essential part of our practice on appeal. Expressions found in numerous decisions of this court, to the effect that only such errors as are embraced in the assignment of errors will be considered, have become by statute a positive law, and if the assignment, as provided for, be not served and filed within the time limited by the statute, no error shall be considered. The statute is express and peremptory in its terms; it is not a mere matter of form that can be waived or dispensed with by the agreement of the parties or lenity of the court, but it is one of substance. It leaves no room for construction or lax interpretation. There is no saving clause, and this court has no choice but to follow and obey the law. (*Corbett v. Job*, 5 Nev. 204; 3 C. J. sec. 1462, p. 1332.)

2. It is urged by counsel for appellant that to sustain the motion would be to derive appellant of his constitutional right of appeal. It is true that the constitution gives the right of appeal, and the legislature, under the pretense of prescribing forms, cannot deprive parties of substantial rights. (*Howard v. Richards*, 2 Nev. 137, 90 Am. Dec. 520.) But it is equally true that the constitutional right of appeal is to be enjoyed and exercised subject to the regulations of law and practices of the court. (*Townsend v. Smith*, 12 N. J. Eq. 350, 72 Am. Dec. 403.) Nor is the case presented by the motion such as to call into exercise the inherent power of the court. Before this principle can be invoked to qualify a statutory limitation, there must be fraud, bad faith, or deception practiced on the part of respondent. (*Smythe v. Boswell*, 117 Ind. 365, 20 N. E. 263.) Neither is charged here.

3. The utmost effect that can be given the affidavits of the parties is that that of counsel for appellant tends to show that counsel for appellant believed that one of the counsel for respondent, when he returned from an extended absence from his office, would stipulate with affiant that the record of the case, as prepared in an abbreviated form and left with another member of the firm, should constitute the record on appeal in this cause; and those of counsel for respondent tend to show that there was no foundation for such belief. Conceding the facts as detailed in the affidavits to be true, they do not authorize a departure from an independent and positive requirement of the statute. The time for serving and filing an assignment of error does not run from the date of the certification of the record on appeal, but from the date of appeal. Assignment of errors is founded upon the bill of exceptions. (2 Am. & Eng. Pl. & Pr. 965.) The bill of exceptions was engrossed, as provided by statute, settled and allowed on the 19th day of June, 1916. The appeal was taken on the same date.

We are in accord with an expression of this court found in the case of *Corbett v. Job*, *supra*, that it is always disagreeable to decide a case upon a mere question of practice. But the statute clearly governs, and its positive requirement leads us to the conclusion, as it did the court in the case of *U. S. v. Tidball*, 3 Ariz. 384, 29 Pac. 385, that if the assignment be not filed within the time limited the omission may not be cured by a subsequent filing.

As the motion has been made and insisted upon, we have no discretion in the premises. The motion to dismiss the appeal must be sustained.

It is so ordered.

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REPORTS OF CASES
DETERMINED BY
THE SUPREME COURT
OF THE
STATE OF NEVADA

APRIL TERM, 1917

[No. 2257]

EMMA G. KEENAN, APPELLANT, *v.* WILLIAM M.
KEENAN, RESPONDENT. SALT LAKE BREWING
COMPANY (A CORPORATION), ET AL., DEFENDANTS.

[164 Pac. 351]

1. DIVORCE—JUDGMENT—CONSTRUCTION.

In a suit instituted in a foreign state other than the state of her husband's residence and in which he had no property a wife secured a decree of divorce. *Held*, that such decree, though treated as one *in rem*, dissolving the bonds of matrimony, has no binding effect *in personam* against the defendant husband, though he was personally served with process in the state of his residence, for such service did not bring him within the jurisdiction of the foreign court.

2. DIVORCE—ALIMONY—DIVISION OF PROPERTY—STATUTE.

Rev. Laws, 2166, declares that in case of the dissolution of the marriage the community property must be equally divided between the parties, and the court granting the decree must make such division as the nature of the case may require, provided that when the decree is rendered, on the ground of adultery or extreme cruelty, the party found guilty is entitled only to such portion of the community property as the court granting the decree may, in its discretion, deem just and allow. A wife secured in a foreign state a decree divorcing her from her husband, who was a resident of the State of Nevada, in which state the community property of the parties was situated. *Held*, that she could not thereafter maintain an independent action in the Nevada courts to secure a division of the community property pursuant to the statute; the statute having reference only to the court granting the divorce.

Argument for Appellant

3. JUDGMENT—PROCESS—SERVICE—VALIDITY.

Process cannot run beyond the borders of the state, and a constructive service by publication or personal service on a nonresident will not support a decree *in personam*, though it may support a decree affecting property within the state where process is issued.

4. JUDGMENT—FOREIGN JUDGMENT—ACTIONS UPON.

While an action may be maintained in one state on a judgment or decree rendered in another, such judgment must be valid, and it will support no action where rendered against a nonresident, who was not served within the state and did not appear.

5. JUDGMENT—SERVICE OF PROCESS—SUBSTITUTED SERVICE.

A judgment on substituted service of summons is enforceable only on the property within the state out of which summons is issued.

6. DIVORCE—ACTIONS—DIVISION OF PROPERTY.

Where a wife procured a judgment of divorce in a foreign state other than Nevada, of which her husband was a resident, she cannot, on the ground of the liberality of the Nevada divorce laws, maintain an action for the division of community property situated in Nevada, for she might properly have maintained her suit in Nevada.

7. APPEAL AND ERROR—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

The dismissal of an action without affording plaintiff an opportunity to amend cannot be complained of, where there was no application for a modification of the order or for time to amend.

8. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

Where plaintiff's complaint was based on a record of a judgment rendered in a foreign state, the sustaining of a demurrer and dismissal of the complaint without affording an opportunity to amend was harmless, though contrary to the better practice, for an amendment could not change the record.

APPEAL from Ninth Judicial District Court, White Pine County; *C. J. McFadden*, Judge.

Action by Emma G. Keenan against William M. Keenan and others. From a judgment for defendants, plaintiff appeals. **Affirmed.**

Paul Pizey, for Appellant:

The statute provides that upon the granting of a divorce the community property shall be divided equally. (Rev. Laws, 2166.)

The complaint in partition must be recognized as

stating a cause of action, whether the State of Nevada recognizes appellant's decree of divorce or not. The decree finds that respondent refused to support appellant and her children, and that he advertised in the newspapers that he would not support them. Such an allegation is of the strongest kind that respondent failed to furnish support for appellant and the children. This is admitted by the demurrer, as it admits all matters that are properly pleaded.

J. M. Lockhart, for Respondent:

No notice to appellant of the bringing of the demurrer to a hearing was necessary. Litigants must be prepared and take notice of the proceedings of the courts, and diligently watch the progress of the matters in which they are interested. No notice to appellant was required, even if no court rule had been in existence. (*Welch v. Jepson*, 58 Pac. 789; *Union Brewing Co. v. Cooper*, 60 Pac. 946.)

If it appears that the matrimonial domicile is in the state where the action is brought, full faith and credit is given if the decree is valid and has been rendered upon sufficient service of process; otherwise, full faith and credit is withheld. (*Haddock v. Haddock*, 201 U. S. 562; 50 L. Ed. 867; *Atherton v. Atherton*, 181 U. S. 155; 45 L. Ed. 794.)

The principle of comity will not apply in *ex parte* actions. (*Stilphen v. Stilphen*, 58 Me. 508, 4 Am. Rep. 305.)

By the Court, MCCARRAN, C. J. :

This action was presumably brought under the statute of this state (section 2166, Revised Laws of Nevada, 1912), which we find to be as follows :

"In case of the dissolution of the marriage by decree of any court of competent jurisdiction, the community property must be equally divided between the parties, and the court granting the decree must make such order for the division of the community property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require; *provided*, that when the decree

of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof is only entitled to such portion of the community property as the court granting the decree may, in its discretion, from the facts in the case, deem just and allow; and such allowance shall be subject to revision on appeal in all respects, including the exercise of discretion, by the court below."

From the record we learn that appellant and respondent were married at Los Angeles, Cal., January 6, 1902; that on August 31, 1914, pursuant to the suit and prayer of this appellant, a decree of divorce was rendered by the district court of Ada County, State of Idaho. At the time of the bringing of the action for divorce, this respondent, defendant in the divorce action, was in business and in possession of certain real and personal property at the town of East Ely, White Pine County, Nevada. Nothing in the record would indicate that he was ever a resident of Idaho. Summons in the divorce action commenced in Ada County, Idaho, was served on the defendant, respondent here, personally, at East Ely, White Pine County, Nevada. The record discloses that in the divorce action in Idaho this respondent made no appearance, either in person or by attorney, and made no attempt to plead or defend in such action, hence default was entered against him.

Some time after the decree of divorce was entered in the Idaho court, this action was commenced in the district court of White Pine County for a partition of the real and personal property "according to the respective rights of the parties interested therein," and that the defendant Keenan, respondent here, be made to disclose and account for the personal property and the value thereof on hand on the 3d day of August, 1914, and the rents and profits of said real property and the profits of his business since that date. A demurrer raising the question of jurisdiction having been sustained by the trial court, appeal is taken to this court from such order.

1. We deem it unnecessary, in arriving at a conclusion here, to pass upon questions suggested as to the jurisdiction of the Idaho court to render the decree of divorce. The appellant here, plaintiff in the Idaho court, chose that forum to determine and terminate the marriage status existing between herself and the respondent. The record would indicate that at the time of the commencement of the action in Idaho the respondent was living in this state and was in possession of considerable property situated in this state. It appears from the decree of the Idaho court, copy of which is in the record, that no property of any nature belonging to respondent or in which he was at all interested was found in the State of Idaho. This fact must have been known to the wife prior to the commencement of her action for divorce, and we refrain from conjecture as to why such action was commenced in a jurisdiction other than that in which the husband resided and the community property, if it was community property, existed. Appellant here, however, having submitted her cause for divorce to the Idaho court, is entitled to the full force and effect of the Idaho decree in so far as the court rendering that decree had power to make it effective; but no more. As to whether that court had jurisdiction, in view of the allegations of the complaint for divorce, to determine the marriage status of the parties or to render a valid decree, is not a question with which we deem it necessary to deal. An action in divorce is generally regarded as proceedings *in rem*, and the Idaho court may have been, and probably was, warranted in entering its decree dissolving the marriage status, inasmuch as one of the parties was deemed to be properly before that court; but further than this the Idaho court could not, and, indeed, did not attempt to go. It had acquired no jurisdiction over either the person of the defendant in the divorce action, respondent here, or over the property. Whatever may be the effect of the decree of the Idaho court on the marriage status of respondent here, the great weight of authority holds

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that under such circumstances as those presented in the record no binding decree *in personam* could have been entered against the respondent. (Black on Judgments, vol. 2, sec. 933; *Pennoyer v. Neff*, 95 U. S. 714; *Proctor v. Proctor*, 215 Ill. 275.)

The proceedings here have not even the dignity of a personal judgment rendered against the respondent in a foreign state. Indeed, even if such were the case, under the rule announced by most eminent authority, such would be void, defendant in that action having been at the time of the rendition of the judgment a nonresident of the state in which the judgment was rendered, and he never having been brought within the jurisdiction of the Idaho court. (*Haddock v. Haddock*, 201 U. S. 567; *Pennoyer v. Neff*, *supra*.)

2. Our statute (sec. 2166) relied upon here, is, in our judgment, quite distinct in so far as its intendment is concerned:

"In case of the dissolution of the marriage by decree of any court of competent jurisdiction, the community property must be equally divided between the parties, and the court granting the decree must make such order for the division of the community property * * * as the nature of the case may require."

It is "the court granting the decree" that must make such order for the division of the community property. The expression here emphasized is found later on in the same section, and in each instance its intendment is clearly indicated; continuing, the statute reads:

"When the decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof is only entitled to such portion of the community property as the court granting the decree may * * * allow."

In the case at bar, it was a foreign court, a tribunal in a foreign jurisdiction, that granted the decree. No court having jurisdiction over the property was called upon to render a decree dissolving the marriage status

or to determine as to equitable distribution. Hence, this is not a case involving dissolution of a marriage status by decree of a court of competent jurisdiction in so far as the community property is concerned.

In California, under a somewhat similar condition, the courts have held that when a decree of divorce is granted and no disposition made of the community property, the wife might assert her interest in such property by another suit in another court, but in the same state. To the same effect has been the holding in a Texas case. (*De Godey v. Godey*, 39 Cal. 157; *Whetstone v. Coffee*, 48 Tex. 269.) We do not here assume to determine, and, indeed, the question is not before us, as to whether a similar construction would apply to our statute under like conditions.

3. It is a well-settled rule that process from the tribunals of one state cannot run into another and summon parties therein domiciled to respond. It is equally true of process sent to parties out of the state in so far as such would tend to establish personal liability. Whatever might be said as to the validity of the judgment and the decree of divorce rendered by the Idaho court as the same might have affected property of respondent in the State of Idaho, where service by summons was by publication or by personal service in a foreign jurisdiction, it will suffice to say in the matter at bar that the effect of the decree of the Idaho court on property within this jurisdiction is *nil*. (15 R. C. L. 913.)

4. It is stated as a proposition of law that an action may be maintained in one state on a judgment or decree rendered in another, whenever such judgment or decree creates a personal obligation. But where such rule is sought to be enforced, the jurisdiction of the court rendering the original judgment or decree must be complete. Such cannot be said when the court rendering the original decree has never acquired jurisdiction either over the person of the defendant or over the property that might be involved.

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Where a party is neither within the jurisdiction nor served with process therein, and no voluntary appearance is made to the suit either by himself or by his authorized representative, the rule is eminently supported that a judgment under such circumstances cannot be enforced against him in a foreign state. (*McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666; *Phelps v. Brewer*, 19 Cush. 390, 57 Am. Dec. 56; 15 R. C. L. 912; *McCreery v. Davis*, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; *Grant v. Swank*, 74 W. Va. 93, 81 S. E. 967, L. R. A. 1915B, 881.)

5. Eminent authority supports the rule that where there is substituted service of summons, the most that can be acquired is a judgment enforceable upon property within the state. (15 R. C. L. 913.)

The identical question found in the case at bar, but considered under circumstances which if presented here would be much more favorable to the contention of appellant, was decided in the case of *Barrett v. Failing*, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505, wherein the Circuit Court of the United States for the District of Oregon held that a statute somewhat similar to ours, existing in the State of Oregon, was limited as to its effect to divorces granted by the courts of Oregon, and could not be taken advantage of to affect community property within the State of Oregon, where the divorce was granted in another jurisdiction. In that case the divorce had been granted in the State of California; the jurisdictional features were complete, inasmuch as both parties were before the California court at the time that tribunal granted the decree. The opinion of Mr. Justice Gray in dealing with the question is quite illuminative of the subject, and the principles of law there enunciated we think may be applied with propriety to the matter at bar.

6. Counsel for appellant, in his brief, lays much stress on the liberality of the divorce laws of Nevada, and by way of argument infers that by reason of such laws the courts of this state as a matter of comity should

recognize the decree granted to appellant in the State of Idaho.

Counsel's position in this respect is dwelt upon at length by the Supreme Court of Idaho in a case, the circumstances of which were almost identical to those presented in the matter at bar, wherein that court held that where the wife abandoned her husband and home in the State of Idaho and took up her residence in another state, voluntarily leaving the jurisdiction of Idaho and leaving the domicile and community property located in that state, and obtained a decree of divorce in another jurisdiction on constructive service, she could not thereafter maintain an independent action within the jurisdiction of the State of Idaho for a division of the community property located therein. (*Bedal v. Sake*, 10 Idaho, 270, 77 Pac. 638, 66 L. R. A. 60.) The court in that case dwelt at some length on the subject, and took occasion to observe that:

"The grounds upon which a divorce may be granted in this state (Idaho) are as numerous as any of our sister states. Hence, under ordinary circumstances and conditions, it is unnecessary for any one to seek another forum in which to prosecute an action for divorce. The plaintiff in this action, for some reason best known to herself, saw fit to leave this state and prosecute her action in Oregon, certainly knowing that a division of the community property could not be decreed by the courts of that state on a service by publication. * * * As we view it, it was the duty of the plaintiff to commence her action in the jurisdiction where the property was situated, procure personal service on the defendant, and thus acquire jurisdiction of the property, and, in the disposition of the case, place the court in a position to settle their marital relations as well as their property rights."

We deem the observation of the Supreme Court of Idaho quite appropriate and applicable to the matter at bar, in view of the circumstances of the case.

7. Counsel for appellant complains of the action of

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the trial court in dismissing the proceedings without affording opportunity for appellant to amend. Whatever force there might have been in the contention of appellant in this respect, we take it to have lost its significance, inasmuch as no application was made to the trial court for either a modification of the order dismissing the action or for time in which to amend.

8. In all cases where a demurrer to a complaint is overruled, we suggest that it is proper practice for the court to afford opportunity for amendment. In the matter at bar, however, the complaint in the action was based upon the record of the Idaho court, all of which was fully set forth. It would be difficult to conjecture how or to what extent the complaint could have been amended, even had opportunity been afforded. Hence, as we view it, no prejudice resulted from the action of the court in failing to extend time in which appellant might amend.

The order of the lower court in sustaining the demurrer should not be disturbed. The order appealed from is therefore affirmed.

Points decided

[No. 2242]

CONSTANCE E. PARKER, RESPONDENT, v. RICK DE BERNARDI, APPELLANT.

[164 Pac. 645]

1. MARRIAGE—COMMON-LAW MARRIAGE.

As the common law prevails in Nevada with reference to the marriage relation, that relation may be formed by words of present assent, and without the interposition of any person lawfully authorized to solemnize marriage, or to join persons in marriage.

2. TRIAL—COMMON-LAW MARRIAGE—INSTRUCTION.

In an action for restitution of real property, in which the defendant alleged that he was the plaintiff's husband and that the property was community property, an instruction that, as the relationship existing between the parties in another state prior to their taking up their abode in Nevada was illicit and meretricious, that relationship must be by the jury presumed to continue illicit and meretricious throughout all the time plaintiff and defendant continued to live together, unless by a preponderance of proof a valid marriage contract was actually made and actually entered into between the parties within Nevada, was erroneous, as taking all force and effect from evidence in the case tending to establish a marital relation between the parties during their residence in Nevada.

3. MARRIAGE—COMMON-LAW MARRIAGE—PRESUMPTIONS AND BURDEN OF PROOF.

Where cohabitation between man and woman was illicit in the beginning, though burden of proof is upon those asserting a valid marriage, there is no presumption that the relationship continued to be illicit, it being a matter of proof, and not of presumption, and a valid marriage under the common law may be shown by proof that the parties sustained toward each other the relation of husband and wife after the impediment to their marriage had been removed; the only presumption to be indulged in being in favor of a valid marriage, which may be based on continuous cohabitation alone.

4. MARRIAGE—COMMON-LAW MARRIAGE—QUESTION FOR JURY.

While prostitution or immorality might militate against the presumption of a legitimate common-law marriage, such facts are for the jury to consider under proper instructions, since, even though the woman were a prostitute, if a marriage of the highest and most sacramental order had been performed between the parties, it would have had no more binding effect than a common-law marriage *per verba de presenti*, actually consummated.

APPEAL from Second Judicial District Court, Washoe County; Thomas F. Moran, Judge.

Action by Constance E. Parker against Rick De Bernardi.

Argument for Respondent

From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. **Reversed**, with instructions to grant a new trial.

James T. Boyd and Roy W. Stoddard, for Appellant:

Foreign laws, or laws of sister states, must be proven like any other independent fact, and it was for the jury to find from the evidence offered, what was the law of California; but the lower court, by its instruction, took from the jury this power, and instructed them as to this matter of fact. (*Cavender v. Guild*, 4 Cal. 250; *Sutherland*, Code P. & P., vol. 1, p. 706.)

In view of her admission that she had taken \$500 of appellant's money, and then failed to comply with her agreement to deposit the deed in escrow, respondent cannot claim that she is the owner of the entire property. "A binding contract for the sale of land, enforceable in equity, although in fact unexecuted, is considered as performed and the land is in equity the property of the purchaser; and upon payment of the full purchase price the purchaser becomes the owner of a complete equitable estate, and the vendor is a mere trustee for the purchaser, and if the purchaser has paid only a part of the purchase price, the vendor is a trustee to the amount paid." (39 Cyc. 1577; *Taylor v. Holmes*, 14 Fed. 498.)

M. B. Moore, for Respondent:

Certain codifications of the laws of the State of California, as published under state authority, were identified by a witness whose qualifications were admitted by appellant. This manner of proving the law of a sister state is a common practice, and is sanctioned by the courts of most states having no statutory provision upon the subject. (Jones on Evidence, sec. 515.) It was no error for the court to instruct the jury upon this subject as a matter of fact. (38 Cyc. 1667; *Menzies v. Kennedy*, 9 Nev. 152.)

Living together as man and wife does not constitute marriage. (*Letters v. Cady*, 10 Cal. 533.) It may have

all the outward appearance of marriage, and still fall far short of marriage. "Marriage is considered in every country as a contract, and may be defined to be a contract according to the form prescribed by the law by which a man and woman capable of entering into such a contract mutually engage with each other to live their whole lives together in the state of union which ought to exist between husband and wife." (Shelford on Marriage and Divorce, 1.) "By cohabitation is not meant simply the gratification of the sexual passions, but to live and dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also." (*O'Malley v. O'Malley*, 129 Pac. 501.)

By the Court, MCCARRAN, C. J.:

Some time during the year 1899 the appellant, Rick De Bernardi, and respondent, who in this action styles herself "Constance E. Parker," took up life together in the city of San Francisco, State of California. Respondent was at that time, according to the record, the wife of one Parker. She was then conducting a place of business in the city of San Francisco. Appellant testifies that it was a rooming-house; respondent unblushingly declares it was a house of prostitution. Some time during the year 1900 respondent here secured a decree of divorce from her former husband, Parker. Following this, appellant contends and testifies that they agreed to live as man and wife. The agreement in this respect, if such there were, was after the granting of the interlocutory decree of divorce by the California court, and before respondent had secured her final decree from that tribunal.

In June, 1904, respondent came to Reno, Nevada, and, as far as we are able to learn from the record, immediately entered into the business of conducting a house of prostitution in the restricted district of that city under the name of "Hazel Ward." In the year 1906 appellant disposed of his business in San Francisco and came to Reno, Nevada; and, from all that we can learn, the relationship that had theretofore existed between appellant and

respondent continued. Some time during the year 1906 appellant purchased, in his own name, a tract of land west of the city of Reno, and within the year following constructed on this tract a house which has since borne the name of "Rick's Resort" or "Rick's Roadhouse." In the construction and furnishing of this house many thousands of dollars appear to have been expended. During the year 1908 appellant made a deed conveying the premises to Constance E. Parker.

This action was commenced in the lower court by respondent, under the name of Constance E. Parker, for the restitution of the premises and for damages for rental and the profits thereof.

Appellant here, defendant in the court below, by way of answer and defense, alleged that the parties were husband and wife, and that the plaintiff's name was Constance De Bernardi; that the deed from appellant to respondent was without consideration, and that the property in question was community property.

A verdict being rendered in favor of plaintiff and an order denying a new trial being entered, appeal is taken from the judgment and order.

Many assignments of error are submitted to this court for consideration; but, in view of the issues presented, we shall confine ourselves to the alleged error of the trial court in giving certain instructions to the jury. The instructions complained of read:

"The court instructs the jury that marriage may be implied or inferred from cohabitation when the cohabitation is not illicit in its origin; general reputation among the acquaintances of the parties; their treatment of each other, their speaking of and addressing each other as husband and wife; acts, sayings and conduct which have a natural tendency to show the existence of the marriage relation.

"You are instructed that cohabitation illicit in its origin is presumed to be of that character unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an

actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent.

"You are further instructed that if you find from the evidence that the plaintiff had another husband living at the time the plaintiff and defendant commenced to cohabit and occupy the same room in the city of San Francisco, and that the relation of the plaintiff and defendant continued without any change in the condition or cohabitation of the parties, and that their declarations as to their being married and being husband and wife referred to their cohabitation in San Francisco and at a time when they could not lawfully marry, and not to any marriage contracted after the plaintiff's divorce from her former husband, Parker, then you should find that there was no marriage between plaintiff and defendant.

"You are further instructed that unless you find that the marriage was in fact entered into and consummated between the plaintiff and the defendant in conformity with the provisions of the laws of the State of California, as hereinbefore defined, and proved in this case that the marriage testified to have existed between the plaintiff and defendant in the State of California, does not constitute a valid marriage and that no obligations can be held to exist between the plaintiff and defendant from such relations in that state, and that such relations were in fact illicit and meretricious and are presumed by law to have continued to be so illicit and meretricious throughout all the time plaintiff and defendant continued their relations to each other, unless the proof shows by a preponderance thereof and to your satisfaction that a valid marriage contract was made and entered into between the plaintiff and defendant in the State of Nevada."

1. We dwell especially upon what we deem to be the error in the last paragraph of the instructions quoted. In the first place, under the law of this state as it has been construed by this court it is not necessary, in order

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to constitute a valid marriage, that any ceremony should be performed by any person or any ceremony had before any person. This court, in the case of *State v. Zichfeld*, 23 Nev. 304, set this question at rest and held that as the common law prevails in this state with reference to the marriage relation, that relation may be formed by words of present assent and without the interposition of any person lawfully authorized to solemnize marriage or to join persons in marriage.

It must be borne in mind that the defense interposed by appellant here in the court below was the marriage relation existing between himself and plaintiff, and his right to possession of the premises in question was based primarily upon the fact as alleged that the property was the result of the joint efforts of the parties. The court by this last instruction told the jury in effect that inasmuch as the relationship existing between the parties in the State of California prior to their taking up their abode in this state was illicit and meretricious, that relationship must be by the jury presumed to continue illicit and meretricious throughout all the time plaintiff and defendant continued to live together, unless by a preponderance of proof a valid marriage contract was actually made and actually entered into between the parties within this state. The force and effect of the language of the trial court, broad and sweeping as it is, was probably lost sight of by the court itself, otherwise it would not have been couched in such language. The illicit and meretricious nature of the relationship of the parties in the State of California must under this instruction be presumed by the jury to continue unless the proof established a valid marriage contract made and entered into between the plaintiff and the defendant *in the State of Nevada*. Indeed, if this instruction were given its full force and effect—and the jury is presumed to give full force and effect to every instruction of law—a marriage ceremony performed between these parties in the most sacred tabernacle, by the highest prelate of some constituted church, under license issued in conformity to

statute, would be unavailing, if perchance that ceremony were performed in a state other than Nevada. Undoubtedly this was not the intention of the trial court, but the instruction was given to the jury, and we have no right to say that the jury looked upon it in any other sense than that conveyed by the specific language employed.

2. The instruction given by the trial court in this instance to our mind swept away the force and effect of all the evidence in this case going to establish a marital relation existing between the parties. But it did more than that. It struck down that principle of law of which the jury should have been advised by proper instruction, and which principle seems to have been deep-seated in the minds of all writers and jurists when dealing with matrimonial relations from very early times in the law's making. "*Semper præsумitur pro matrimonio*" was expressive of a doctrine in the early writings of the common law. Indeed, this expression we find made use of in all the ancient discussions bearing upon marriage relation to such an extent that it gained the dignity of being termed a maxim. "Every intendment of the law leans to matrimony," says Mr. Bishop in his work on Marriage and Divorce. Continuing, the learned author observes:

"When a marriage has been shown in evidence, whether regular or irregular, and whatever the form or the proofs, the law raises a strong presumption of its legality—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. So that this issue cannot be tried like the ordinary ones which are independent of this special presumption." (1 Bishop on Marriage, Divorce and Separation, 957.)

This prescription of the law by Mr. Bishop is, as we will later have occasion to cite, supported by eminent writers on the subject from the pioneer days of the common law to the present time.

It is the contention of respondent in the case at bar

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that, in view of the relationship existing between the parties in the State of California prior to their coming into this state, this instruction was properly given. It is needless to observe that the relationship of the parties in California, at least prior to the time at which the respondent here secured her final decree of dissolution from her former husband, was meretricious and illicit. Respondent contends that not only in this condition presented by the record, but the relationship existing between the parties is made further illicit by reason of the habits and life of the parties themselves, in this: That respondent, while living in the State of California, and indeed during her residence in Nevada, was for a part of the time, at least, the mistress in a house of prostitution, and that the relationship existing between the parties was nothing more than that usually existing between a prostitute and her paramour.

Whatever there may be of merit in the contention of respondent, there is another phase to the case as presented by the record, and one which appellant here was entitled to have fully considered by the jury under proper instructions. The cohabitation or relationship entered by the parties in the State of California was, according to the testimony of appellant, that of husband and wife. He says they there agreed to live together as such. At that time he was engaged in the hack business in San Francisco, and she conducted a rooming-house. Whatever the relationship may have been in California, it was continued after the parties came to this state. The impediment which prevented a legal marriage between the parties in California was removed after the final decree of divorce was granted to respondent in California and after they had taken up their abode in this jurisdiction.

During their cohabitation in this state, certain things appear to have transpired between the parties which to our mind went a long ways toward establishing the marriage relation, and which, were it not for the erroneous instruction, the jury would undoubtedly have regarded as

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constituting marriage between the parties. The parties here lived together at and in the premises here in question from 1907 until 1911. A daughter of respondent lived with them during a part, if not all, of that time. During a part of the time, an adopted infant, Roy De Bernardi, was maintained and cared for by the parties as their own child, at and in the premises in question. On September 26, 1907, appellant and respondent, as man and wife, executed an instrument of mortgage to the Washoe County Bank, of Reno, Nevada, by which instrument the very premises here in question were pledged as security to the bank for a loan of \$7,500, and to which instruments the respondent here signed her name "Constance De Bernardi"; and the notarial acknowledgment to the instrument recites that:

"On the 26th day of September, in the year one thousand nine hundred and seven, * * * personally appeared Rick De Bernardi and Constance De Bernardi, his wife, known to me to be the persons described in and who executed the foregoing instrument, who acknowledged to me that they each executed the same freely and voluntarily and for the uses and purposes therein mentioned; and the said Constance De Bernardi was by me made acquainted with the contents of said conveyance, and she acknowledged to me, on an examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion or undue influence of her said husband, and that she does not wish to retract the execution of the same."

On January 4, 1908, the parties here executed, as man and wife, another mortgage, to Frank Bros. Company, a corporation of Washoe County, by which instrument they pledged certain bar fixtures and appliances in the saloon known and called "Rick's Resort," and other personal property at or about the same place, to which instrument of mortgage the respondent again signed her name "Constance De Bernardi." It appears from the record that on November 30, 1909, and while the parties were

living together at Rick's Roadhouse, or Rick's Resort, respondent and appellant instituted proceedings in the district court of Washoe County for the adoption of a child. An excerpt from the petition of the parties in the adoption proceedings is found in the record and reads as follows:

"That your petitioners are anxious and desirous of adopting the child, Edwin Baker Freeman, as their own, to have said child sustain toward each other the legal relation of parent and child, and said child to have all the rights, including the right of maintenance, protection, education and inheritance, and be subject to all the duties of that relation, and that the natural parents of said child be relieved of all parental duties toward and all responsibilities for said child and have no right over him."

And another excerpt from the same instrument reads:

"We promise and agree to properly raise, educate, maintain and care for the said Edwin Baker Freeman as our own child, and to always keep him in the best of surroundings and the best of associations and to comply with the adoption laws of the State of Nevada in each and every respect."

To this instrument we find respondent and appellant signing their respective names "Rick De Bernardi" and "Constance De Bernardi."

Pursuant to the proceedings for adoption of the child, it appears that the district court granted the prayer of the petitioners; and the child was thereafter known as "Roy De Bernardi."

A significant thing appears in the record in connection with this adoption proceedings, in the form of a postcard, which, according to the testimony of respondent, was mailed by her at Stanwood, Wash., while she was visiting with her relatives at that place, on which postcard, addressed as it is to "Mr. R. De Bernardi, Reno, Nevada, Box 132," we find the salutation: "Dear Papa." Then following a scribble, which according to the testimony of respondent was made by the child, we find the words: "Love, Roy."

It appears that in 1908 the parties visited the home of the parents of respondent in the State of Washington; that on the occasion of their visit to her father's home there was a family gathering, at which respondent's father, stepmother, brothers, and other members of her immediate family were present. Testifying as to this incident, respondent says:

"Q. Who introduced Rick to the other members of the family? A. Well, I guess I did.

"Q. How did you introduce him? A. As my husband.

"Q. As your husband? A. Yes, sir.

"Q. And if I understand you correctly, you agreed here to go up there and just be husband and wife for that trip, is that right? A. We didn't say just for that trip; we didn't say anything about that. I just agreed to introduce him as my husband to my folks; but I told him that he couldn't come along up to my folks, that we would go along to Seattle together, but that I couldn't take him home. He said, 'Well, you can introduce me as your husband'; so that is how it came that I took him along.

"Q. Well, did you agree while you were there to act as man and wife, or to live as man and wife? A. That was all, just what I told you, that we agreed to do.

"Q. And you did live there as man and wife, did you not? A. Under that agreement, just what you heard me say.

"Q. Did you live at your father's house in Washington with the defendant here, Rick De Bernardi, as man and wife? A. Yes."

From the testimony of the witness W. H. Caughlin, the party from whom the premises here in question were purchased and who lives in the neighborhood of the place known as Rick's Roadhouse, we find that on the occasion when the witness first met respondent it was on the introduction of appellant at the roadhouse, and on that occasion appellant introduced respondent as his wife.

From the testimony of the witness Frank D. King, the attorney who conducted the adoption proceedings in the

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district court, we learn that on the occasion of those proceedings respondent gave the witness to understand that she was the wife of Rick De Bernardi.

From the record as it is made in the lower court, it would appear that the respondent here passed and transacted business and was known by several names. On some occasions she was "Hazel Ward"; on others she was "Constance E. Parker"; and at still other times she was "Constance E. De Bernardi." When it suited her convenience in negotiating a loan with the Washoe County Bank, she was "Constance De Bernardi," the wife of the appellant. When it suited her convenience in the adoption of a child, she was "Constance De Bernardi," and the child of her adoption was named after appellant. When it suited her convenience, she took appellant into the sacred precincts of her father's home, and there, surrounded by her relatives in the family circle, she introduced this appellant as her husband and lived with him under her father's roof as man and wife. When it suited her convenience, she even trifled with the most sacred sentiments of love and guided the baby hand of the child of her adoption in addressing appellant as "Papa."

All of these circumstances and conditions were presented to the jury by the evidence adduced at the trial. But the trial court in its instruction to the jury swept away all of these matters from their consideration in its statement of the law wherein it declared that inasmuch as the relationship existing between appellant and respondent in the State of California was illicit and meretricious, therefore the law presumed that this condition continued illicit and meretricious unless the proof showed by a preponderance thereof that a valid marriage contract was made and entered into between the parties in the State of Nevada.

3. Respondent here contends that the relationship of these parties, even conceding an agreement of marriage entered into in California, was at that time and in that state not only illicit and meretricious, but adulterous,

hence the court was justified in asserting the law to be as he stated it in his instructions. In other words, it is the contention of respondent that the agreement by the parties, if such there were, to live together as man and wife, was made in a state and at a time where and when, by reason of the impediment then existing with reference to respondent, such marriage was invalid; and being invalid, and there being no subsequent agreement to live together as man and wife after the impediment had been removed, the relationship between the parties continued, as in the first instance, to be meretricious and illicit. Such contention is not supported by the great weight of authority.

In the very early case in England entitled *Campbell v. Campbell*, Law Rep. 1 H. L. Sc. 182, subsequently referred to as the "Breadalbane Case," the House of Lords adjudged that, notwithstanding the fact that in the beginning the relationship existing between the parties was adulterous, yet a legal marital relation commenced as soon as the parties were, by the removal of the impediment, made capable of contracting marriage. The case then before the House of Lords was one in which a married woman had eloped and lived in adultery with her paramour. Prior and subsequent to the death of her husband, both she and the party with whom she had eloped made public utterances proclaiming that they were married. The Breadalbane case is again referred to by the House of Lords in a later controversy entitled *De Thoren v. Attorney-General*, cited in volume 1 of the Law Reports, Appeal Cases, H. L. Sc., at page 686. In the Breadalbane case above referred to, Lord Westbury took occasion to remark:

"There is nothing to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence, at a previous period, of some bar to the interchange of consent."

Continuing, he assumes to assert the rule that:

"There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation. * * * I think a

sounder rule and principle of law * * * that you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract."

This language was again quoted with approval in the De Thoren case, *supra*. In establishing the rule applicable to such cases, Lord Chelmsford declared:

"If the cohabitation begins in an illicit intercourse, and is continued after the bar to marriage (whatever it may be) is known to be removed, habit and repute may have their proper operation upon the continuing cohabitation, which is not to be referred to the original intercourse."

Lord Selborne, in addressing himself to the subject under the Scottish law, said:

"It is, however, an error to suppose that what is called habit and repute is a mere element of proof directed to the establishment of the actual constitution of marriage at some moment of time, supposed to be single and definite, though not precisely ascertained by such mutual declarations as would be necessary for the direct proof of a marriage *per verba de præsenti*. Consent to be married persons (it matters not in what manner expressed, or whether expressed at all, otherwise than tacitly, *rebus et factis*) is all that is necessary to infer in these cases, from habit and repute—the mutual consent, and not the mode of declaring or interchanging it, being that which, by the law of Scotland, constitutes marriage."

This same doctrine was referred to in the early case of *Hyde v. Hyde*, 3 Bradf. (N. Y.) 509, wherein the court held that, where the intercourse had been in the inception meretricious, there must be evidence to show that the character was subsequently changed, but it was not indispensable to prove a ceremonial marriage. If the parties by their conduct and declarations professed to be bound by marital ties, and thus exhibited the continuation of their cohabitation upon a different footing from what it had formerly been, the conclusion may be in favor of marriage. In the case of *Morris v. Davies*, 5 Cl. & Fin.

163, Lord Lyndhurst, speaking of the consideration to be given in favor of marriage, said:

"The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive."

Much of the doctrine asserted by the early case of *Campbell v. Campbell*, *supra*, otherwise known as the Breadalbane case, has not been universally accepted by the courts of the several jurisdictions in the United States, but in the case of *Travers v. Reinhardt*, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865, the supreme court, speaking through Mr. Justice Holmes, quoted approvingly from the decision of the House of Lords in that case:

"* * * That cohabitation as husband and wife is a manifestation of the parties having consented to contract the relationship *inter se*. It is a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation."

The Supreme Court of the United States in that case had presented to it facts and circumstances very similar to those presented by the record in the case at bar, and there, as here, the evidence supporting the marriage relation consisted, among other things, in the act of the parties in signing a mortgage as husband and wife, each of the parties signing the surname of the husband.

In the case of *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106, the court was dealing with a case where the evidence established illicit relations between the parties on the occasion of their first cohabitation, and where in the first instance nothing in their conduct or reputation indicated

the marriage relation. Later, however, the parties lived openly together as husband and wife, and were recognized as such by their relatives and by parties in business transactions. The court there held that, even though the intercourse was at first illicit and was not then accompanied by any of the evidences of marriage, yet inasmuch as it later assumed a matrimonial character and was surrounded by the evidences of a valid marriage, a question of fact arose for the determination of the jury. It was for the jury to weigh the presumption arising from the meretricious character of the relationship in its origin, with a presumption arising from subsequent acknowledgments, declarations, repute, and so forth, and decide whether all of the circumstances taken together were sufficient evidence of marriage.

It will be observed that the instruction here complained of takes from the jury a very salient rule of law that has found sanction at the hands of most eminent authors, to the effect that every intendment of the law is in favor of matrimony, and wherever there is room for a presumption, it operates in favor of a valid marriage. (*Shepard v. Carter*, 86 Kan. 125, 38 L. R. A. n. s. 568.)

The presumption in favor of a valid marriage has been declared to be one of the strongest known to the law. This is especially true where by the declaration of the parties such marriage has been asserted or where by their acts or conduct, together with their continuous cohabitation, such relationship has been established to their friends, relatives and associates. This presumption of valid marriage is one which, in our judgment, may properly be indulged in, even though, as here, the circumstances indicate illicit relations in the first instance, but where, as here, the parties, after the removal of the impediment by which their relations were made illicit, continued to cohabit; and especially is this presumption to be indulged in where, as in the case at bar, we find the parties transacting business as husband and wife and otherwise openly and publicly declaring their relationship.

To this effect we find the very recent case of *Haywood v. Nichols*, 160 Pac. 982; and to the same effect are the cases of *Shepard v. Carter*, *supra*, and *Schuhart v. Schuhart*, 78 Am. St. Rep. 342.

In a leading case which deals at length and learnedly with the subject under consideration, wherein the courts of New York had occasion to pass upon a similar question, it was, as we think, properly held that the common law presumes marriage; that is, it presumes every marriage legitimate until the contrary is shown, as it presumes every man innocent, and that every man obeys the mandate of the law and performs his social and official duties until the contrary is shown. (*Caujolle v. Ferrie*, 23 N. Y. 90.)

In our research for authority on the subject at hand and for light to guide us in the proper interpretation of the rule, we have found no jurisdiction in which meretricious cohabitation has been dealt with more severely than in the courts of the State of New York. (*Bates v. Bates*, 7 Misc. Rep. 547, 27 N. Y. Supp. 872; *Foster v. Hawley*, 8 Hun, 68; *Wilcox v. Wilcox*, 46 Hun, 32, 10 N. Y. St. Rep. 746; *Chamberlain v. Chamberlain*, 71 N. Y. 423.)

The tenor of the decisions in these cases is to the effect that if the cohabitation is meretricious in its origin, its continuance must be presumed until proof of a change and of marriage. Hence, Mr. Wattershall, in his work on *The Law of Domestic Relations in the State of New York*, page 14, asserts the rule as established in New York to be that an illicit relation between man and woman is presumed to continue as such. It will never ripen into marriage until the parties by a new agreement make the relation matrimonial. But, notwithstanding the earlier cases as reported from the several courts of New York, which to a greater or less extent support this rule, and notwithstanding the apparent tendency of the courts of that jurisdiction to hold rigidly to such a doctrine, we find what we deem to be a more modern and humane rule, and indeed one which to our mind more correctly conforms to the spirit of the common law as interpreted

by the earlier writers, asserted in such cases as *Fenton v. Reed*, 4 Am. Dec. 244, and *Caujolle v. Ferrie*, *supra*, and the case of *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677.

In the latter case, the Court of Appeals of New York took occasion to remark:

"The presumption of marriage, from a cohabitation apparently matrimonial, is one of the strongest presumptions known to the law. * * * The law presumes morality, not immorality; marriage, and not concubinage; * * * where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

And in that case we find the learned justice who delivered the opinion of the court quoting with approval the language of Lord Lyndhurst in the case of *Morris v. Davies*, *supra*.

In the case of *Gall v. Gall*, *supra*, the court dealing with the question of presumption in such matters, stated the rule to be that where it is admitted that the cohabitation of the parties was illicit in its origin, the presumption is that it was continuous, and before it can be characterized as a lawful relation, proof is required of such acts and circumstances as indicate that the relation has ceased to be illicit and becomes matrimony. However, the court said:

"It is sufficient if the acts and declarations of the parties, their reputation as married people and the circumstances surrounding them in their daily lives naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife."

In the case of *Tracy v. Frey*, 88 N. Y. Supp. 874, the matter of the application of the rule of presumption as it has been applied by the courts of the State of New York is gone into at length.

The doctrine asserted in the case of *Gall v. Gall*, *supra*, we find approved in the later case of *In Re Terwilliger's Estate*, 118 N. Y. Supp. 424. In the latter case,

sanction is given to the principle that even where the relation in its inception was meretricious, and although there was no proof of any ceremonial marriage or other contract of marriage thereafter, yet subsequent marriage relation may be presumed from the continued cohabitation and from such acts and declarations as indicate the intention of the parties to assume the legitimate marital status.

Hence we may observe that, even under the rigid rule adhered to by the courts of New York, the instruction here given, and which is here assigned as error, would not have received sanction. Under the instruction as given by the trial court in the case at bar, nothing short of a preponderance of the proof sustaining a valid marriage contract made and entered into between the parties in the State of Nevada would support the existence of the marital relation. This instruction, in the way in which it was given, took from the jury the long-established rule of presumption in favor of the legitimacy of the marriage relation. But it did more than that; it called for the establishment by a preponderance of proof of the actual making of a valid marriage contract by and between the parties after the impediment which existed with reference to the respondent here had been removed. The jury could view this instruction in no other light than calling for proof of another and new agreement, either verbal or in writing, entered by the parties after they came to Nevada.

We have referred to the rule asserted by the early writers upon the subject, and we find this supported and sustained by a strong line of modern authority. We think a correct statement of the rule to be that, where the cohabitation was illicit or meretricious in the beginning, the burden of proof is upon those asserting a valid marriage, nevertheless there is no presumption that the relationship continued to be illicit. It is a matter of proof, and not of presumption, whether the relationship continued to be illicit, or whether it was changed to a legal and moral status; and the only presumption to be indulged

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in in such matters is in favor of the legitimacy of the relationship. Moreover, we are of the opinion, in the light of what we deem the weight of recent authority, that the rule would be more correctly stated to say that, although cohabitation between a man and woman was in the first instance illicit or meretricious, a valid marriage under the common law may be shown by proof that the parties sustained toward each other the relation of husband and wife after the impediment to their marriage had been removed. This doctrine we find supported by eminent authority. (*Coad v. Coad*, 87 Neb. 290, 127 N. W. 455; *Prince v. Edwards*, 175 Ala. 532, 57 South. 714; *Drawdy v. Hesters*, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. n.s. 190; *Darling v. Dent*, 82 Ark. 76, 100 S. W. 747.) And to the same effect is the case of *In Re Fitzgibbons*, 162 Mich. 416, 127 N. W. 313, 139 Am. St. Rep. 570.

In our judgment the language of the trial court as used in this instruction conveyed an erroneous impression to the jury, by reason of which they were misled; for, even though it may be contended for as a proposition of law that where at the inception the relationship is illegal or illicit, and the presumption of the continuance of such relationship applies until there is a change in the circumstances, yet even then and under such conditions the presumption of marriage is warranted, where a very slight change is indicated by the habits or declarations of the parties. (*Smith v. Smith*, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362.) Even where the only proof in the case is of continuous cohabitation, the jury may be warranted in indulging in the presumption that it is lawful. But where to this is added some affirmative proof of the parties having held themselves out as husband and wife, as in the case at bar, it adds just so much to the force of the presumption. (1 Andrews, American Law, 2d ed. sec. 486.)

In the case of *Drawdy v. Hesters*, *supra*, the question was considered under circumstances presented by the record somewhat similar to the matter at bar. An instruction was offered containing the words:

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"I charge you that marriage arises and exists in contract, and it needs to be proved as other civil contracts, when property rights are involved and depended upon."

The Supreme Court of Georgia, in passing upon the proposed instruction, said:

"The use of the words 'and it needs to be proved as other civil contracts' is rather indefinite, and tends to minimize the value of evidence of general repute and the effect of parties holding themselves out as husband and wife."

In the case of *Darling v. Dent*, *supra*, the court had presented to it the case of a married woman having separated from her husband and having gone into a foreign state, there cohabiting with the man Darling, the cohabitation continuing for some time. The impediment to a legal marriage relation with Darling was removed only by the death of her husband. The court took occasion to remark that:

"While it is true that, if it be shown that the relations between Darling and Mrs. Williams were illicit in the beginning, the burden is upon those asserting a valid marriage agreement to show that such an agreement was afterwards entered into, still there is no presumption that the relationship continued to be illicit. It is a matter of proof, and not of presumption, whether the relationship continued to be illicit, or whether it was changed to a legal and moral status. Whatever presumptions are indulged are in favor of the legitimacy of such relationship."

Supporting this doctrine will be found the very recent case of *Davis v. Whitlock*, 90 S. C. 233, 73 S. E. 171, Ann. Cas. 1913D, 538; and to the same effect is *Adger v. Ackerman*, 115 Fed. 124.

The courts of Maryland have held, with a uniformity quite unvarying, that there cannot be a valid marriage without a religious ceremony. (*Richardson v. Smith*, 80 Md. 89.) Notwithstanding this, we find in the early case of *Redgrave v. Redgrave*, 38 Md. 93, the court recognized the doctrine that:

"Where parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married."

In support of this proposition, the court referred to the cases of *Hervey v. Hervey*, 2 W. Bl. 887, *Goodman v. Goodman*, 28 L. J. Ch. 1, and *Jewell v. Jewell*, 1 How. 219.

In referring to the usual manner of proof by which the marital status might be established, the court reaffirmed the law as pronounced in *Boone v. Purnell*, 28 Md. 607, to the effect that:

"The most usual way of proving marriage, except in actions for criminal conversation and in prosecutions for bigamy, is by general reputation, cohabitation, and acknowledgment."

The Supreme Court of Colorado, in the case of *Henry v. McNealey*, 24 Colo. 458, quoted approvingly from Bishop on Marriage and Divorce, to the effect that:

"When a man and woman are living together in apparent matrimony, so that they are accepted by the community as husband and wife, they are presumed, in the absence of counter presumptions or proofs, not to be violating the due order of society and breaking the law, but to be in fact married."

Continuing, the court said:

"This presumption, it will be seen, is founded upon the maxim that fraud and covin are not generally presumed; the presumption of the law being usually in favor of honesty and morality."

4. Counsel for respondent contends that, whatever cohabitation there might have been by the parties in this state, such can raise no presumption of common-law marriage, and that their cohabitation in this state was not such as the law requires to raise that presumption; and in this respect much stress is laid upon the fact that the respondent conducted a house of prostitution in Reno and resided therein at times. We are not unmindful of

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the facts presented by the record as to the private life of both of the parties to the controversy. We know of no rule of law, at least none such as would be applicable here, that would prevent a prostitute from intermarriage with her paramour. Certainly, if under such conditions marriage were not performed by the usual and ordinary ceremony, it might, by reason of the conduct of the parties, require a higher degree of proof. A jury impaneled to determine the question of the marriage status of the parties should be permitted to consider the evidence under a correct rule of law; and while prostitution or immorality might militate against the presumption of legitimacy, nevertheless such is for the jury to consider under proper guidance. There was evidence in this case going to establish a mode of life which if taken alone would not be conducive to the presumption of a marriage relation; but, on the other hand, there was evidence of cohabitation, coupled with utterances and declarations by the parties at times far remote from the occasion of any controversy. The instruction of the court deprived the appellant of the force and effect of this evidence.

Speaking on the subject of the proof necessary to establish the marriage relation where the same is claimed *per verba de præsenti*, the Supreme Court of the United States, in the case of *State of Maryland v. Baldwin et al.*, 112 U. S. 490, speaking through Mr. Justice Field, gave expression to a principle of law which we deem quite applicable to the matter at bar; and in that respect the court held that to meet the considerations of public policy in such matters, public recognition was necessary; and, exemplifying this principle, the court said:

"And it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them whilst living together, such as deeds, wills, and other formal instruments. From such recognition the

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reputation of being married will obtain among friends, associates and acquaintances, which it is of itself evidence of a persuasive character."

The parties are not here, nor were they in the court below, on trial for their moral conduct; and even though she was a prostitute, as she declared herself to be, if a marriage of the highest and most sacramental order had been performed between the parties it would have had no more binding effect than a common-law marriage *per verba de præsenti* actually consummated. If in this union property was acquired which in its nature was community property, his rights therein, as well as hers, are to be settled, not by their moral standing in the community, but by the law.

If he declared her to be his wife in her presence and in the presence of others on occasions when to save the property in question they pledged it as security for a loan, and if she on such occasions, and while she lived and cohabited with him on the premises, signed such mortgage as his wife and with his name, and if on that occasion the relationship of husband and wife existed between them under the common law, is the relationship less now that she denies such because by so doing it may be to her advantage? If she was the wife of appellant when they mutually asserted that fact in the giving of a chattel mortgage to Frank Bros., in which instrument other property than the Rick Roadhouse was pledged, and if then they declared that by common law they were married, when did the common law become ineffective as binding their connubial relations? If at common law they were man and wife for the purpose of adopting a child and giving it the name which each declared to be theirs, are they now less man and wife when, to gain possession of the premises in which for years they cohabited, one of the parties finds it more advantageous to deny such relationship?

As we view the law applicable to the subject, interpreted by jurists and text writers from the very earliest times,

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as well as under the present and more modern theory, the appellant here was entitled to have the facts and circumstances presented in the light of a different instruction. The instruction here complained of set at naught all of the circumstances arising out of the transactions wherein the parties had publicly and privately recognized each other as husband and wife, and where the respondent in transacting business and in invoking the power of the courts in times past had given evidence in no uncertain way that she was the wife of appellant. The error complained of was one vital to the issues.

The order appealed from is reversed, with instructions to the lower court to grant a new trial.

It is so ordered.

[No. 2230]

**EVELYN WOODS MERRITT, APPELLANT, v. FRED-
ERICK CHARLES MERRITT, RESPONDENT.**

[160 Pac. 22; 164 Pac. 644]

1. DOMICILE—EFFECT OF MARRIAGE.

At common law, it was a well-founded rule that a woman on her marriage lost her own domicile and acquired that of her husband.

2. DOMICILE—WIFE'S RIGHT TO ACQUIRE.

A wife may acquire and maintain a domicile separate from that of her husband.

3. DIVORCE—JURISDICTION.

A complaint in divorce alleging plaintiff's residence in W. county, that defendant is within the jurisdiction of the court and can be served in W. county, gives the court jurisdiction under act of February 23, 1915 (Stats. 1915, c. 28), section 1, amending Stats. 1861, c. 33, sec. 22, giving jurisdiction if defendant can be found in the county.

ON REHEARING

1. DIVORCE—BONA FIDE RESIDENCE—EVIDENCE.

Evidence in a suit for divorce held sufficient to establish plaintiff's *bona fide* residence within the state, though she admitted she was living at a hotel and owned no property within the state.

APPEAL from Second Judicial District Court, Washoe County; R. C. Stoddard, Judge.

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Argument for Appellant

Action for divorce by Evelyn Woods Merritt against Fred Charles Merritt. From a judgment that the court was without jurisdiction and an order denying plaintiff's motion for a new trial, plaintiff appeals. **Judgment and order reversed.**

M. B. Moore, for Appellant:

Under the law and the facts as presented in the record, appellant is entitled to an order of this court that this action be remanded, with instructions to the lower court to enter a decree of divorce as prayed for in the complaint; or if, after a full consideration of all the facts, this court is of the opinion that the trial court was without jurisdiction, appellant is entitled to an order remanding the case, with instructions to the lower court to vacate its former order and dismiss the action.

Unless a fraud was perpetrated upon the court, the lower court had jurisdiction, and, having jurisdiction, should have granted the relief prayed for. (*Wallace v. Wallace*, 50 Atl. 788.)

The residence of a party must be construed in accordance with the provisions of section 3609, Revised Laws of 1912, and section 1, Statutes of 1913, p. 493. (*Fleming v. Fleming*, 134 Pac. 445.)

Our laws are enacted and our courts organized for the benefit, protection and relief of our own people, and of those who may bring themselves within the provisions of our statutes; and it is not a question for this court to determine what view a court of some other state, whose laws and needs are different from ours, may take. The legislature having passed the act, it is the duty of our courts to enforce it and to construe it in accordance with the intention of the legislative body enacting it, regardless of the opinion of the courts of other states. As has been well said by this court, it is not the duty, privilege, or within the powers of the courts of this state to legislate something into an act not fairly intended by the legislature. (*Tiedemann v. Tiedemann*, 36 Nev. 494.)

Ordinarily an appellate court will not disturb, but will

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adopt, the findings of the trial court where there is a conflict of the evidence. The rule is otherwise, however, where there is a substantial failure of the evidence to support the findings. (*Miller v. Miller*, 64 Pac. 415.)

The question of residence at the trial of such a case as this is a question of fact, the same as any other material allegation in the complaint. (*Winans v. Winans*, 28 L. R. A. 992; *Sneed v. Sneed*, 123 Pac. 314; *Miller v. Miller*, 64 Pac. 415.)

Hoyt, Gibbons & French, Amici Curia:

There was no intention on the part of the trial court to repudiate the authority of the well-known case of *Tiedemann v. Tiedemann*, 36 Nev. 494. The court recognized the authority of the Tiedemann case, but believed that the case at bar lacked proof of a showing of intent on the part of plaintiff to reside in Nevada; consequently the court was obliged to find want of jurisdiction. No part of the opinion of the court is devoted to a discussion of the weight of the evidence taken, nor of the sufficiency of the evidence. All that is said by the court seems to have been directed to the question of the sufficiency of the complaint. The finding of fact upon which the court based the judgment of dismissal was that "the proof submitted is not sufficient to give the court jurisdiction in said cause." This finding can be reversed only if this court concludes from an inspection of the testimony taken that all of the elements of jurisdiction were in fact sufficiently proved by the plaintiff and her witnesses. *Bona fide* residence is essential, in addition to bodily presence within the county, which *bona fide* residence is just as essential where the length of residence, as in this case, is not important, as where the length of residence is important. If the evidence fails to disclose that the plaintiff was a *bona fide* resident, it would follow that one essential is missing, and that the lower court was therefore justified in its finding.

While it may be true that there is no evidence before the court which negatives the *bona fides* of the residence

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of plaintiff, it is equally true that there is not one word of testimony to be found in any part of the record that shows that she adopted this state or the county as her home or domicile within the meaning of the word residence as commonly applied in divorce proceedings. Merely to come to this state and remain long enough to obtain a divorce does not constitute residence within the meaning of the law of divorce. (*Presson v. Presson*, 38 Nev. 203.)

By the Court, MCCARRAN, J.:

This is an appeal from a judgment rendered by the district court of the Second judicial district and from an order denying appellant's motion for a new trial.

The action in the lower court was one for divorce. The judgment and decree rendered by the court below was as follows:

"It is therefore ordered, adjudged and decreed that the court is without jurisdiction in said cause; and it is therefore ordered, adjudged and decreed that the plaintiff take nothing by this action."

By this decree as entered and found in the records, it must be assumed that the court dismissed the proceedings for want of jurisdiction.

While it might appear that the court attempted to make findings on the merits of the case, it will not be presumed here on review that such was in reality the intention of the court, inasmuch as the court by its judgment and decree found itself without jurisdiction to entertain the cause. If the court was without jurisdiction, either by reason of the subject-matter of the action or by reason of the failure of the parties to bring themselves within that jurisdiction, it will not be contended, we apprehend, that the court had any power to determine the merits of the action. Nor do we assume, in view of the form of the judgment, that the court in reality attempted to determine the case on its merits.

In this proceeding, we are confronted with a situation

that brings before us again the much-discussed divorce statute of our state.

Section 1 of appellant's complaint in the court below sets forth:

"That plaintiff resides in the city of Reno, county of Washoe, State of Nevada; and that said defendant is at the time of signing and filing of this complaint within the jurisdiction of this court and that service of the summons and other process may be made upon him in Washoe County, Nevada."

Our divorce statute, enacted by the legislature of 1915, approved February 23, 1915, is in part as follows:

"SEC. 22. Divorce from the bonds of matrimony may be obtained, by complaint under oath, to the district court of the county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided six months before suit be brought, for the following causes. * * *"
(Stats. 1915, p. 26, amending Stats. 1861, c. 33.)

The power of our legislature to enact this statute, and others of similar nature, wherein that body, representing the people of the state, seeks to regulate marriage and divorce, will, we apprehend, not be questioned. As was said by Mr. Chief Justice Talbot in his concurring opinion in the case of *Tiedemann v. Tiedemann*, 36 Nev. 501:

"Generally speaking, the marital status of the citizen, the age of consent, the manner in which marriage may be solemnized, the obligations it imposes affecting personal or property rights, the time, condition of residence and causes required for obtaining divorce, are all within the control of the state and subject to her laws as enacted by the legislature."

We have here before us, then, the policy of our state applicable to the subject of divorce as that policy is framed and enacted by the legislature, the representatives of the people. The courts have neither the power

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nor the right to read into that statute anything not there found, nor to strike therefrom that which is there presented. The legislature in enacting this statute sought to prescribe certain jurisdictional prerequisites, in view of which or on the presentation of which the district courts of the state might take jurisdiction where parties sought to secure dissolution from the bonds of matrimony. Any one of five conditions presented in a verified complaint would, as we view this statute, be sufficient to give the district court jurisdiction. The district court might take jurisdiction: (1) If the cause of action therefor accrued in the county; (2) if the defendant resides in the county; (3) if the defendant may be found in the county; (4) if the plaintiff reside in the county, if such county be the one in which the parties last cohabited; (5) if the plaintiff reside in the county for a period of six months before suit be brought. Time of residence is not essential to any of the conditions, save and except the fifth; and in that case a residence of six months is a part of the condition.

The complaint in this action makes the specific allegation that plaintiff resides in the city of Reno, county of Washoe, State of Nevada; and further that the defendant at the time of signing and filing of the complaint was within the jurisdiction of the court and that service of summons and other process might be made upon him in Washoe County, Nevada. The return of the sheriff shows that the summons was personally served upon the defendant, Frederick Charles Merritt, within Washoe County. The appellant in this action sought to confer jurisdiction upon the district court of Washoe County under the third condition as we have above enumerated them, namely, by the allegation that the defendant was to be found within Washoe County and hence within the jurisdiction of the Second judicial district court.

1. In the case at bar, as in all cases of a similar character, the important question to determine is that of jurisdiction. In determining this we must look to the

status of the parties. This brings us to the question of domicile or residence. At common law, it was a well-founded rule that a woman on her marriage loses her own domicile and acquires that of her husband. (*Barber v. Barber*, 16 U. S. 582, 16 L. Ed. 226; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530; Ann. Cas. 1912D, 400, see note.)

2. That she may acquire a separate and distinct domicile from that of her husband is a rule established by the courts of England (2 Bish., Marriage and Divorce, sec. 63), as well as by the courts of the several jurisdictions in the United States (*Frary v. Frary*, 10 N. H. 61, 32 Am. Dec. 395; *Tolen v. Tolen*, 2 Blackf. [Ind.] 21 Am. Dec. 742; *Moffatt v. Moffatt*, 5 Cal. 280; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; *Succession of Benton*, 106 La. 494, 31 South. 123, 59 L. R. A. 135). The right of the wife to acquire and maintain a separate domicile from that of her husband arises out of the necessity presenting itself in the case and is based upon the assertion on the part of the complaining wife of grounds or causes by reason of which the matrimonial unity no longer exists in fact. (*Atherton v. Atherton*, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; *Frary v. Frary*, *supra*; *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88, Ann. Cas. 1912D, 395, see note; *Duxstad v. Duxstad*, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. Rep. 1138; *Jenness v. Jenness*, *supra*.)

3. The allegation of those causes which of themselves indicate that the marriage unity no longer exists constitutes the basis for the rule that recognizes the right of the wife to prosecute her suit for divorce in a domicile other than that of her husband. Coupled with such allegations, an averment of residence constitutes the basis of jurisdiction.

This entire matter, in so far as the wording of the statute is concerned and its meaning, force, and significance, was gone into at length by this court in the case

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of *Tiedemann v. Tiedemann, supra*, and the decision of this court in that instance, in so far as it dwells upon the particular provision of the statute here mentioned, will not be disturbed.

It will be remembered that so far as the courts are concerned, they have nothing to do with the establishment of public policy or the question of expediency; those are matters for the legislative branch of the government exclusively. It is but for the courts to interpret a statute and enforce it in the light of constitutional provisions. There is nothing in either international law or in the organic law of our state that prohibits or restricts the legislature from enacting a provision such as the statute here in question, wherein it seeks to deal with the matter of divorce between citizens or residents.

The question of fraud or collusion does not arise here. It is not presented to us in any form. If it is present in the case, the trial court, when the matter comes up anew, can determine that for itself upon the merits.

Viewing it as we do, that the case of *Tiedemann v. Tiedemann, supra*, was determinative of the matter as to the jurisdiction of the trial court, it follows that the judgment of the court and the order denying the motion for a new trial must be reversed.

It is so ordered.

ON REHEARING

By the Court, MCCARRAN, C. J.:

On petition of *amici curiæ* in behalf of the district court of the Second judicial district, we granted rehearing in this matter, in order that there might be presented any matter which we inadvertently or otherwise overlooked on the original hearing.

On the former consideration of this case we reversed the judgment of the trial court, on the rule as settled by this court in the cases of *Tiedemann v. Tiedemann*, 36 Nev. 501, 137 Pac. 824, and *Presson v. Presson*, 38 Nev. 203, 147 Pac. 1081; and to these authorities might be

added *Aspinwall v. Aspinwall*, 40 Nev. 55, 160 Pac. 253, Harvard Law Review, February, 1917, p. 391.

Counsel in their petition say:

"We believe that no matter of law has arisen in this case upon which there is any difference between this court and the court below. Both courts entertain the belief, in harmony with the doctrine of both the Tiedemann and Presson cases (36 Nev. 501, 137 Pac. 824, 38 Nev. 203, 147 Pac. 1081), that *bona fide* residence is just as essential where the length of residence, as in this case, is not important, as where the length of residence is important."

Continuing, they say:

"If, then, an inspection of the evidence in this case fails to disclose that the plaintiff was a *bona fide* resident, it would follow that one essential was missing, and that the court was therefore justified in finding that 'the proof submitted is not sufficient to give the court jurisdiction.' "

Our inclination is rather to affirm our former judgment without extended comment; but we deem it not inadvisable here to refer to the evidence as presented in this case as to the *bona fide* residence of appellant. In her complaint for divorce she alleges:

"That plaintiff resides in the city of Reno, county of Washoe, State of Nevada."

In testifying as a witness in her own behalf at the original hearing, the record discloses the following:

"Q. You may state your name. A. Evelyn Woods Merritt. Q. Where do you reside, Mrs. Merritt? A. Reno, Nevada. Q. Whereabouts in Reno? A. At the Riverside Hotel."

By the testimony of H. H. Clark it was disclosed that appellant had been a resident of that establishment since January 16, 1916, and continuously thereafter to and including the date of the trial in the court below.

On the hearing in the lower court and after the suggestion of the trial court to the effect that he had very serious doubts as to the jurisdiction of the court in the matter, the appellant was again interrogated, and testified:

"Q. Have you any other home, or claim any other home or residence than in the city of Reno? A. No."

Following this, the court interrogated as follows:

"Q. Do you own any property in Reno? A. No. Q. In the State of Nevada? A. No. Q. Have you any business or profession or anything that engages your attention here at the present time or since you have been here. A. No; I simply live here."

On being further interrogated by her attorney she testified:

"Q. Just one question: Your income is derived from what source principally, Mrs. Merritt? A. Several mortgages, and some bonds. Q. And some stocks? A. Bonds. Q. And when you have been in New York and other sections of the country, where have you lived, at hotels, or have you had a home? A. I have lived at hotels always."

Whatever may have been in the mind of the trial court from which he could arrive at the conclusion that there was a lack of jurisdictional facts presented, the record fails to disclose other than a *bona fide* residence within the jurisdiction. The trial court apparently took the witness in hand, and her answers in response to his interrogatories were to the effect that she lived at a hotel in the city of Reno; that she owned no property in Washoe County nor at any other place within the state. Neither of these facts would to our mind indicate anything militating against the *bona fides* of her residence within the state. The time was when hotels and inns were not regarded as permanent places of abode, but in this modern day and age no such intimation or presumption is justified. So far as the showing made in the court below was concerned, the facts disclosed were sufficient, in our judgment, to warrant the court in assuming jurisdiction and rendering the decree prayed for. Both parties were before the court. Service of summons was made within the county. The facts presented in the court below, as disclosed by the record, sustained the allegations in the complaint of appellant, and it is our judgment

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that the court should have assumed jurisdiction and should have rendered the decree of divorce.

In the case of *Aspinwall v. Aspinwall*, *supra*, we reasserted the rule that the question of residence is one that may depend on the act and intention of the party seeking to establish the same.

There was nothing disclosed by the testimony of the appellant, neither was there anything indicated by her acts or conduct, as we find them, that would go to say that her residence in the county was other than *bona fide*, and certainly nothing to justify an inference *contra*.

The judgment of the lower court is reversed, with instructions to that tribunal to enter the decree of divorce as prayed for.

It is so ordered.

[No. 2263]

P. J. CONWAY, PETITIONER, *v.* THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF LYON, AND HON. T. C. HART, JUDGE OF SAID DISTRICT COURT, RESPONDENTS.

[164 Pac. 1009]

1. PARTNERSHIP—ACTIONS AGAINST PARTNERS—CHARACTER OF JUDGMENT—INDIVIDUAL JUDGMENT.

Under Rev. Laws, 5239, providing that judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, and section 5240, providing that, in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper, in an action against partners, the court did not exceed its jurisdiction by rendering judgment against one of them.

Certiorari by P. J. Conway to the District Court of the Eighth Judicial District of the State of Nevada, in and for Lyon County, and the Hon. T. C. Hart, Judge of said Court, to review a judgment against petitioner. **Proceedings dismissed.**

Argument for Respondent

Mack & Green, for Petitioner:

"The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant any relief consistent with the case made by the complaint and embraced within the issue." (Rev. Laws, 5241.) This provision constitutes the limitation upon the jurisdiction of the court. (*Marshall v. Golden Fleece M. Co.*, 16 Nev. 173.) Jurisdiction is limited to the issues made by the pleadings. (*Munday v. Vail*, 34 N. J. L. 422; *Brown on Jurisdiction*, par. 2a.) A judgment must conform to the pleadings, and no issue not included therein may be decided without exceeding the jurisdiction of the court. (*Frevert v. Henry*, 14 Nev. 194; *Bachman v. Sepulveda*, 39 Cal. 688; 22 Ency. Pl. & Pr. 585; *York v. Fortenbury*, 25 Pac. 163; *Goddard v. Hart*, 10 Ill. 96.)

E. E. Hull, for Respondent:

If the court found that the defendant Conway had obligated himself jointly or severally for the payment of plaintiff's wages, it was bound to render judgment against said defendant accordingly, even though he was sued as a copartner. Under the practice which obtains in this state, it is wholly immaterial if the defendants be named as copartners, or otherwise, if they, or any of them, are found to be liable under the contract sued upon. (*Morgan v. Righetti*, 45 Pac. 260; *Harrison v. McCormack*, 69 Cal. 620; *Cuyamaca Granite Co. v. Pacific Paving Co.*, 95 Cal. 256, 30 Pac. 525.)

Our legislature has done all in its power to cut off from our practice the old and cumbersome rules of the common law relating to practice, to the end that complete justice may be done the parties to every action brought before the courts, and has even gone so far as to provide a means of binding parties to a contract sued upon who were not for any reason made parties to the action, by any judgment rendered in the action. Thus, we have the "joint debtor" or "joint obligor" act incorporated into our system of procedure in its fullest terms. "A plaintiff,

suing against several as partners for a breach of a contract, may recover against such as he can prove to be parties to the contract, without proof of the partnership." (Black on Judgments, 2d ed. vol. 1, sec. 208; Bates on Law of Partnership, vol. 2, sec. 1094; *Stoddart v. Van Dyke*, 12 Cal. 437; *First National Bank v. Simmons*, 98 Cal. 290.)

By the Court, MCCARRAN, C. J.:

Suit was commenced in the justice court against P. J. Conway, E. J. Ross, and R. C. Mudge, as copartners. Ross and Mudge failed to appear or answer; Conway alone defended. Judgment was rendered for the plaintiff in the justice court. On appeal to the district court, a trial *de novo* was had. The latter court found that no partnership existed between the parties; but, notwithstanding the fact that Conway was sued upon a debt alleged to have been contracted by the partnership, judgment was rendered against him individually. The proceedings come to this court by *certiorari*.

Petitioner contends that the court below exceeded its jurisdiction in rendering an individual judgment against Conway; and in this respect they contend that the suit having been brought against the partnership, judgment could run only against the partnership and not against individuals.

At common law in an action against two or more defendants upon an alleged joint contract of liability, the judgment was required to be against all the defendants or in favor of all. The common-law rule applicable to the question here was asserted by Lord Ellenborough in the early case of *Weall v. The King*, 12 East, 452, to be based on the principle that the proof of the contract must correspond with the description of it in all material respects. Hence, where partnership was alleged, partnership must be established by the proof, and a several judgment could not issue where at the time of the alleged making of the contract the parties sued were partners. It is generally conceded that this rule must prevail in all jurisdictions where the common law has been accepted or adopted and

where no statutory provision has been enacted abrogating the same.

In a number of the states of the Union, statutory provisions have been enacted, and these "joint debtor acts," so-termed, have been held to effect an abrogation of the common-law doctrine. Hence, we inquire, has the common-law rule been interfered with by our statute?

Section 5239, Revised Laws (section 297 of the Civil Practice Act) provides:

"Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

The following section provides:

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper."

Mr. Black, in his Treatise on the Law of Judgments, vol. 1, sec. 208, in discussing the effect of the "joint debtor acts," lays down the general principle to the effect that, where such acts exist, a plaintiff suing several as partners for a breach of a contract may recover against such as he can prove to be parties to the contract without proof of partnership.

A provision in the code of California identical to the one found in our civil practice act was construed by the supreme court of that state in the case of *Morgan v. Righetti*, 45 Pac. 260, and the application made in earlier cases was referred to and reaffirmed. (*Rowe v. Chandler*, 1 Cal. 167; *People v. Frisbie*, 18 Cal. 402; *Loan Co. v. Hall*, 110 Cal. 490, 42 Pac. 962.)

In the late case of *Dobbs v. Purington*, 136 Cal. 70, 68 Pac. 323, the supreme court again referred to the rule laid down in *Rowe v. Chandler*, *supra*, and reaffirmed its position taken in *Lewis v. Clarkin*, 18 Cal. 399; *Shain v. Forbes*, 82 Cal. 583, 23 Pac. 198; *Bailey v. Hall*, 110 Cal. 490, 42 Pac. 962; *Morgan v. Righetti*, *supra*.

In all these cases the court recognized the common-law rule, but held, however, that in view of the statutory provision the common-law rule was no longer applicable, and that judgment might be given against one of several defendants sued on a partnership debt; this, too, where, as here, it was found that no partnership existed.

Counsel for petitioner complain of the doctrine asserted in these decisions, and claim that it is not supported by authority generally.

In Missouri the statute provides:

"In all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable." (Section 2772, Rev. St. Mo. 1909.)

Section 1981 of the same act provides:

"In all actions founded on contract and instituted against several defendants, the plaintiff shall not be nonsuited by reason of his failure to prove that all the defendants are parties to the contract, but may have judgment against such of them as he shall prove to be parties thereto."

These provisions were construed by the Supreme Court of Missouri in the case of *Crews v. Lackland*, 67 Mo. 619, and it was there held that, by reason of the code of Missouri, the plaintiff suing several as partners for breach of contract might recover against such as he could prove to be parties to the contract without proof of the partnership.

In the case of *Bagnell Timber Co. v. Missouri, K. & T. Ry. Co.*, 180 Mo. 420, 79 S. W. 1130, the Supreme Court of Missouri reversed a judgment because the evidence failed to show that one of the parties defendant entered into the contract jointly with the other. The court in that instance failed to give recognition to the force of the statute making all contracts joint and several. After retrial in the lower court, the court of last resort again considered the question, and in the latter instance reversed its former decision, and held that under statutory provisions, such as found here, contracts which at common law were joint only are now joint and several, and any one or more of the obligees thereto may be

sued and a recovery had against those only whom the evidence shows to be liable thereon. Speaking of its former decision, the court says:

"It is inconceivable * * * what induced the court to hold on the former appeal that because the petition declared upon a joint contract a recovery could not be had against those defendants who the evidence showed were liable thereon." (*Bagnell Timber Co. v. Missouri, K. & T. Ry. Co.*, 242 Mo. 11, 145 S. W. 469.)

To the same effect were the cases of *Hutchinson v. Richmond Safety Gate Co.*, 247 Mo. 71, 152 S. W. 52, and *Berkshire Lumber Co. v. Chick Inv. Co.*, 168 Mo. App. 342, 153 S. W. 1078.

Section 429 of the civil practice act of the State of Nebraska (Cobbey's Ann. St. 1911, sec. 1414) provides that:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper."

In the case of *Long & Smith v. Clapp*, 15 Neb. 417, 19 N. W. 467, the supreme court of that state, in an action against two defendants charging them with the making and breach of a joint warranty, held that, the evidence being ample as to one, but insufficient as to the other, defendant, the judgment might be against one and for the other.

Similar provisions in the code of Colorado led the supreme court of that state to hold that the equitable doctrine that partnership debts are joint and several does not obtain in a purely legal action, and that a several judgment might be rendered where the suit was commenced against a partnership. (*Exchange Bank v. Ford et al.*, 7 Colo. 315, 3 Pac. 449.)

A provision in the code of Tennessee of similar import was applied by the supreme court of that state in the early case of *Lowry v. Hardwick*, 4 Humph. (Tenn.) 188, and there the court held that under the provisions of the statute a creditor might sue any one or more of several joint obligors or partners, and such suit was not a bar to a suit subsequently brought against the remaining partners or obligors.

The case of *Francis v. Dickel & Co.*, 68 Ga. 225, involved the question of the application of a provision in the code of that state where suit was brought against a partnership and judgment rendered against an individual. The court held that by reason of the provisions of the statute, if it appears on the trial of such a case that some of the defendants are not liable and ought not to be joined in the action, the suit will not abate or be quashed on that account, but may proceed against the other defendants. To the same effect was the earlier case of *Wooten & Co. v. Nall*, 18 Ga. 609.

The code of Oregon provides:

"Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

"In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others." (Sections 180 and 181, L. O. L.)

The Supreme Court of Oregon, in the late case of *Bertin & Lepori v. Mattison*, 80 Or. 354, 157 Pac. 153, after reviewing many decisions rendered by that court upon an application of the statute, held that the common law had been abrogated by legislation; and under such statutes the plaintiff may recover from those defendants against whom he is able to establish his case, although he is compelled to lose his hold upon the others from whom he seeks to recover.

In the case of *Knatz v. Wise*, 16 Mont. 555, 41 Pac. 710, the court had presented to it conditions analogous to the matter at bar. There, as here, the action was in part for services rendered. Parties named as defendants were alleged to be copartners. Judgment was rendered against one of the parties named in the copartnership. The action was dismissed as to the other defendants. The court held that, if recovery could be had against any of the defendants upon the facts proved, had they been sued alone, then the recovery was proper, although plaintiff may have joined others in the action against whom no liability was shown. This decision rested entirely on the provision in the practice act of Montana.

In all of the jurisdictions where this question has been considered, the authorities have recognized that individual judgments in such cases gain sanction only by reason of statutory enactments which set aside the common-law rule. From an almost uniform line of decisions applying such statutes the rule has become crystallized to the effect that, if a plaintiff sues two or more defendants on a joint obligation, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be liable when the others are not liable. (23 Cyc. 807.)

The facts presented to the district court upon which it based its judgment and conclusion are not before us. The matter being here by the process of *certiorari*, the sole question is as to whether the lower court exceeded its jurisdiction in rendering an individual judgment against one of the parties named in the copartnership. By reason of our peculiar statute, we conclude that the judgment of the district court must remain undisturbed. The proceedings are dismissed.

It is so ordered.

Per Curiam:

Petition for rehearing denied.

Argument for Appellant

[No. 2226]

C. H. MCINTOSH AND H. R. COOKE, AND C. H. MCINTOSH AND H. R. COOKE, DOING BUSINESS UNDER THE NAME AND STYLE OF MCINTOSH & COOKE, TRUSTEE, RESPONDENTS, v. CHARLES E. KNOX, APPELLANT.

[165 Pac. 337]

1. GARNISHMENT—WRONGFUL GARNISHMENT—LIABILITY.

The assignee of a judgment may recover damages for its wrongful garnishment in an action to which he is not a party without showing malice or suing on the attachment bond or under specific statutory authority.

2. GARNISHMENT—WRONGFUL GARNISHMENT—DAMAGES.

The assignee of a judgment may recover damages for the period a wrongful garnishment of it remained in force, although the judgment debtor on the day following such garnishment instituted interpleader proceedings and paid the money into court.

3. GARNISHMENT—WRONGFUL GARNISHMENT—DAMAGES.

The assignee of a judgment wrongfully garnished may recover attorney's fees paid in interpleader proceedings instituted by the garnished judgment debtor.

4. JUDGMENT—CONCLUSIVENESS.

Where a judgment debtor instituted interpleader proceedings upon being garnished, but the right of a claimant to recover attorney's fees was not made an issue nor decided in such suit, the question is not rendered *res judicata* so as to prevent recovery of such fees in an action by the claimant for the wrongful garnishment of such judgment.

APPEAL from Fifth Judicial District Court, Nye County;
Mark R. Averill, Judge.

Action by C. H. McIntosh and H. R. Cooke, doing business as McIntosh & Cooke, against Charles E. Knox. Judgment for plaintiffs, and defendant appeals. **Affirmed.**

Hugh H. Brown and *J. H. Evans*, for Appellant:

The appellant and respondents joined issue in a trial of title on the equity side of the federal court. The sole issue in the case was title. In that character of suit there can be no other issue. The respondents paid an attorney fee of \$600 in the prosecution of that case. The expenditure was a necessary, customary and inevitable incident of the case. The successful litigants were

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deprived of the use of the litigated fund for a period of months while the suit was pending trial and determination. The delay was a necessary and inevitable incident of the litigation. In actions of this character, it is not the policy of the law to hold unsuccessful litigants liable for incidental and consequential damages.

Under the great weight of authority, an action for damages for wrongful attachment must be grounded upon one of the following grounds: (1) There must be malice or want of probable cause; (2) the action must be on the attachment bond; (3) there must be some specific statutory authorization for the action. In the case at bar the respondents did not sue on an attachment bond; they did not rely upon any statute as a basis for the action; malice and want of probable cause are out of the case. No action arises from the prosecution of an unsuccessful or groundless action unless there be malice and want of probable cause, or bad faith. (*Henderson v. Iron Ore*, 38 Fed. 36; *Kemp v. Brown*, 43 Fed. 391; *Burton v. St. Paul Ry. Co.*, 22 N. W. 300; *Stewart v. Sonneborn*, 98 U. S.; *Smith v. Story*, 4 Humph. 169; *Stone v. Swift*, 16 Am. Dec. 349; *Wilcox v. McKenzie*, 75 Ga. 73.) The only remedy is on the attachment bond, in the absence of malice. (*Frantz v. Hanford*, 54 N. W. 474.) Malice and want of probable cause must be shown. (*Collins v. Shannon*, 30 N. W. 731.) "In this state, the defendant in an attachment suit, where the attachment has been wrongfully issued, has an action on the attachment. * * * If the attachment has been procured maliciously and without probable cause, he may proceed under the common law in an action for malicious prosecution." (*Jaksich v. Guisti*, 36 Nev. 110.)

"Without a bond for the payment of damages, or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything." (*In Re Williams*, 120 Fed. 37;

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Tullock v. Mulvane, 184 U. S. 487; *Scheck v. Kelley*, 95 Fed. 941.)

The attorney's fees should not have been allowed. (*Oelrichs v. Williams*, 15 Wall. 211; *Lindeberg v. Howard*, 146 Fed. 467.) "Such fees not being recoverable on bonds given in federal courts, no recovery can be had in an action in a state court on a bond given in a federal court." (33 L. R. A. n.s. 845.) "In most state jurisdictions, recovery may be had on a bond for services in dissolving injunction, but not for trial of main case." (Id., par. 1-4.) "Where the main case results merely incidentally in the dissolution of the injunction, and there were no services by reason of the injunction separate and distinct from other issues in the case, no attorney's fee can be recovered." (*Collins v. Huffman*, 93 Pac. 220.) When an action is brought independent of the bond, no attorney's fee can be recovered. (4 Cyc. 887; *Bonds v. Garvey*, 39 South. 492; *McGill v. Fuller & Co.*, 88 Pac. 1038; *Bogard v. Tyler's Administrator*, 78 S. W. 138.)

A third party whose property is attached as that of another, cannot recover attorney's fees paid to obtain release of the attachment unless there be a bond or statutory authorization to support the case. (*First National Bank v. McSawin*, 75 S. E. 1106; *Hopkins v. Pratt*, 7 La. Ann. 335; *Joslin v. McGee*, 39 Pac. 349; *Eickhoff v. Tidbalt*, 61 Tex. 421; *Farmers Co. v. Gibbons*, 55 S. W. 2; *Corner v. McIntosh*, 48 Md. 374; *Bonds v. Garvey*, 39 South. 492.)

A judgment on the merits rendered in a former suit between the same parties, or their privies, on the same cause of action, by a court of competent jurisdiction, is conclusive, not only as to every matter which was offered and received to sustain or defeat the claim, but also as to every other matter which with propriety might have been litigated and determined in the action. (23 Cyc. 1170.) The plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the litigation and which

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the parties, exercising reasonable diligence, might have brought forward at the time. (*McLeod v. Lee*, 17 Nev. 117; *Sherman v. Dilley*, 3 Nev. 17.) A valid judgment is conclusive between the parties, not only as to such matters as were in fact determined in the proceeding, but as to every other matter which the parties might have litigated as incident to, or essentially connected with, the subject-matter of the litigation, whether the same as a matter of fact were considered or not. (Freeman on Judgments, sec. 249; *Denver I. Co. v. Meddaugh*, 21 Pac. 565; *Bingham v. Kearney*, 68 Pac. 597.)

H. R. Cooke, for Respondents:

"Where property has been attached, which does not belong to the attachment defendant, the claimant * * * has a right of action at once * * * to recover damages. Attachment plaintiff is liable to the claimant, not only when he directed the wrongful levy, but also when he subsequently ratifies the officer's acts, independently of any bond. * * * It is sufficient to aver that the attachment and levy thereof was wrongful, it not being necessary to allege that the attachment was malicious and without probable cause. All actual damages resulting from the wrongful seizure are recoverable from plaintiff in attachment, and in such damages may be included necessary expenses incurred in a suit to recover the property." (4 Cyc. 762-769.)

Attorney's fees should be included in the damages recovered. "Attorney's fees for defending an injunction suit at the trial on the merits may be recovered in an action on the bond, although the injunction was not the sole object of the action." (*Hyatt v. Washington*, 67 Am. St. Rep. 248; *Neilson v. Albert Lea*, 91 N. W. 1113; *Littleton v. Burgess*, 16 L. R. A. n. s. 69; *Trapnall v. McAfee*, 77 Am. Dec. 159; *Tisdale v. Mayor*, 68 Am. St. Rep. 273.) "The right to recover for reasonable attorney's fees paid or incurred in obtaining the discharge of the attachment rests upon the same principle as other costs and expenses

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incurred for the same purpose." (2 Sutherland, Damages, 62; *Ah Thair v. Quan Wan Co.*, 3 Cal. 261; *Behrens v. McKenzie*, 92 Am. Dec. 428; *Reece v. Northway*, 12 N.W. 258; *Gonzales v. Tobacco Co.*, 26 South. 1012; *Bolling v. State*, 39 Am. Rep. 5; *Prader v. Grim*, 13 Cal. 585; *Brown v. Jones*, 5 Nev. 374.)

The fact that the attachment plaintiff brings in the third party, owner of the attached property, as a party, in no manner affects the right of such third party to sue in independent action and recover damages. (6 C. J. 416; *Dimsdale v. Tollerton Co.*, 131 N. W. 689.)

Appellant claims there can be no recovery because of the interpleader suit. Any claim for interest, attorney's fees, etc., would have been premature until the primary question of ownership of the fund was settled. No assertion of items in the present controversy could have been made in the equity suit, because it could not be known until the equity case was finally decided whether respondents would have any standing to claim such items. "The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not." (23 Cyc. 1300.) Estoppel applies only to questions actually litigated and determined. (Id., 1302-1304, 1311, 1314.)

Where, in an attachment action, an excessive levy was made, causing defendant damage, he could not counterclaim thereon, because the damage claim did not exist at the commencement of the action. (*Esbensen v. Hover*, 33 Pac. 1008; *Union Bank v. Cross*, 75 N. W. 992; *Jeffreys v. Hancock*, 57 Cal. 646; *Jones v. Swank*, 55 N. W. 1126; *Tessier v. Lockwood*, 24 N. W. 734; *Tecoma Co. v. Perry*, 73 Pac. 801; *Gunnis v. Cluff*, 4 Atl. 920; *Youngerman v. Long*, 63 N. W. 674.)

The right to recover damages is not affected by the fact that the owner intervened as a claimant in the

attachment suit and recovered judgment therein, or that there was a rendition of judgment in that suit adverse to plaintiff. (6 C. J. 416.)

In an interpleader suit, the question of value or damages for detention cannot as a general thing be considered; this for the reason that the issue is usually, if not invariably, restricted to establishment of claimants' rights. (4 Cyc. 742; *Swift & Co. v. Russell*, 97 Fed. 443.) In such a suit the only issue to be tried is whether or not the property claimed is that of the defendant in the writ and liable to its satisfaction. (*Schloss v. Inman*, 30 South. 667; *Graham Paper Co. v. Crowther*, 92 Mo. App. 73.)

By the Court, COLEMAN, J.:

Respondents brought suit in the district court of Nye County to recover damages for the wrongful attachment of a judgment which had been assigned to them, and for attorney's fees expended in procuring the release of the funds thus attached. Judgment was rendered in the lower court in favor of respondents as prayed, and from such judgment and an order denying a new trial this appeal is taken.

We will not undertake to state all of the details of the case, but such facts only as will be necessary to a full understanding of the questions involved. R. P. Dunlap brought suit in the District Court of the United States for the District of Nevada to recover judgment against the Montana-Tonopah Mining Company, of which Knox was president, for quite a large sum, and in due time recovered judgment. Thereafter the judgment was assigned by Dunlap to McIntosh & Cooke, who gave notice thereof to the judgment debtor, after which an appeal was taken by the company to the United States Circuit Court of Appeals, which later affirmed the judgment of the lower court. McIntosh & Cooke again gave notice to the company of the assignment, which was brought to the attention of Knox, after which, and before the judgment was paid, Knox brought suit in the

Opinion of the Court—Coleman, J.

United States District Court to recover judgment against Dunlap, who left the state before personal service was made upon him, and attached the judgment theretofore assigned by Dunlap to McIntosh & Cooke by causing garnishment papers to be served upon the Montana-Tonopah Mining Company, of which Knox was still the president. The Montana-Tonopah Mining Company filed in the United States District Court its bill of interpleader, alleging the matters hereinbefore stated, and prayed for an order allowing it to pay the money over to the clerk of the court, to be awarded to the person or persons finally found by the court to be entitled to it. Such an order was made, and the money was paid accordingly. McIntosh & Cooke and Knox appeared in the interpleader proceedings and filed their answers to the bill. On the final hearing the court awarded the money to McIntosh & Cooke.

1. The first contention made by counsel for appellant is that the court erred in rendering judgment in favor of the respondents for damages alleged to have been sustained by them by the wrongful garnishment of the judgment which had been assigned to them by Dunlap. On this point counsel clearly state their theory in their brief, as follows:

"Under the great weight of authority, an action for damages, for wrongful attachment, must be grounded upon one of the three following premises: (1) There must be malice or want of probable cause; or (2) the action must be on the attachment bond; or (3) there must be some specific statutory authorization for the action."

We think the point would be well taken in a suit for damages by a defendant in an action wherein the property attached belonged to the party sued, but such is not the case here. McIntosh & Cooke were not the parties to the attachment suit, but were strangers to it. The rule of law applicable to the situation here is laid down as follows:

“Where an officer levies a writ of attachment on the property of a stranger, attachment plaintiff is liable to the claimant of the ownership and right of possession thereof not only when he directed the wrongful levy, but also when he subsequently adopts or ratifies the officer’s acts, independently of any bond, and jointly with the attaching officer.” (4 Cyc. 764.)

See, also, *Peterson v. Foli*, 67 Iowa, 402, 25 N. W. 677; *Moore v. Winter*, 67 Ark. 189, 53 S. W. 1057; *Lee Merc. Co. v. Chapman*, 9 Kan. App. 374, 58 Pac. 125; *Blakeley v. Smith*, 16 Ky. Law Rep. 109, 26 S. W. 584; *Knight v. Nelson*, 117 Mass. 458; *Perrin v. Claflin*, 11 Mo. 13; *Vaughn v. Fisher*, 32 Mo. App. 29; *Cole v. Edwards*, 52 Neb. 711, 72 N. W. 1045; *Dyett v. Hyman*, 129 N. Y. 351, 29 N. E. 261; *Adams v. Savery House*, 107 Wis. 109, 82 N. W. 703; *Riethmann v. Godsman*, 23 Colo. 202; *Frick-Ried v. Hunter*, 148 Pac. 83; *Taylor v. Hines*, 31 Mo. App. 622; *Comly v. Fisher*, Taney’s Dec. (U. S.) 121; 6 C. J., p. 416, sec. 966.

May, 1917, issue of Case and Comment, on p. 1023, calls attention to the note to the case of *Davies v. Thompson* (L. R. A. 1917B, 395); but as that volume is not yet in our library, we have not been able to avail ourselves of the note in question.

2. But it is insisted that in view of the interpleader proceedings, which were instituted the day after the attachment suit was commenced, pursuant to which the money due under the judgment obtained by Dunlap was paid into court, the attachment proceedings were automatically terminated and that they lost their force and effect, and consequently practically no damage was caused respondents by the conduct of appellant in instituting the attachment suit and in causing the levy thereunder. We cannot look at the matter in this light. In view of the departure of Dunlap from the state, no personal service of process was had upon him, and the jurisdiction of the court to inquire into the controversy depended upon the contention that property belonging to him was seized and held by attachment proceedings.

If it had been conceded by Knox in the main suit that the attachment had lost its efficacy, that case would have fallen, and the subsequent proceedings along with it; hence it was of vital importance to Knox that the force and effect of the attachment proceedings be maintained which he seems to have realized by his conduct in the interpleader suit. Consequently we cannot escape the conclusion that in legal effect the attachment still held good.

There is one peculiar circumstance in this case. As we have said the writ of attachment in *Knox v. Dunlap* was served December 30, 1912, and the bill of interpleader was filed in the federal court at Carson City the following day. Carson City is about nine hours' travel from Tonopah, where the office of the Montana-Tonopah Mining Co. is situated, and where its attorney and secretary resided. Mail leaving Tonopah on the morning of December 31, 1912, would not have reached Carson City on that day until about 6 o'clock in the evening, after the office of the clerk of the United States District Court was closed. Hence the inference is that the bill of interpleader was mailed in Tonopah on or before the morning of December 30, the very day the attachment was served in the suit of *Knox v. Dunlap*. In the light of these facts, we cannot escape the conclusion that the Montana-Tonopah Mining Company knew of the contemplated attachment in the suit of *Knox v. Dunlap*, and in anticipation thereof had caused to be prepared the bill of interpleader before the writ of attachment had been served. If Knox did not inspire this quick action, who did? Yet he insists that because of the interpleader proceedings he must be relieved from liability in the attachment suit. But be this as it may, the attachment suit was in full force and effect during all of the time the interpleader suit was pending; and, had the interpleader suit been dismissed for any reason, the money was still tied up in the attachment suit, according to appellant's contention, as shown by the prayer in his answer in the interpleader suit.

It is contended that, if respondents are entitled to judgment in any amount, it should not be for the amount for which judgment was rendered in the lower court, for the reason that the delay of the federal court in rendering judgment in the interpleader proceedings was due to the neglect of counsel for respondents to file briefs, and that the judgment should be reduced in an amount equal to the interest for that period of delay. The trial court found that there was nothing in the evidence to justify this contention, and in view of the record we do not feel justified in holding that the conclusion thus reached was reversible error.

3. The next question is: Did the trial court err by including in its judgment, as an element of damage, the sum of \$600, paid by respondents as attorney's fees in the suit in the federal court? We think not. It was necessary to a protection of their rights that they appear and show their title to the judgment under the assignment. No money judgment was sought against the respondents in the suit in the federal court in which the money was attached, or in the interpleader action. While, so far as we are informed, the attachment statutes of all the states provide that the plaintiff in an attachment suit shall give a bond to indemnify the defendant against all damages in case it should be adjudged that the attachment proceedings are wrongfully instituted, none of such statutes specifically designates the attorney's fee incurred by the defendant in defending the attachment proceedings as an item of damage. Yet the great weight of authority holds that such an expense is an item of damage. (2 R. C. L. 909; *Plymouth G. M. Co. v. U. S. Fidelity Co.*, 88 Pac. 567; *Parish v. Van Arsdale Co.*, 140 Pac. 835; *Balinsky v. Gross*, 128 N. Y. Supp. 1062; *Drake on Attachments*, 7th ed. sec. 175; *Boatwright v. Stewart*, 37 Ark. 623; *Fry v. Estes*, 52 Mo. App. 1; C. J. 528, 529; 4 Cyc. 878.)

This rule is not only sustained by the great weight of authority, but we think is founded on sound reason as well. Attachment proceedings are purely statutory in

practically all of the states (2 R. C. L., p. 801), and are very different from an ordinary action at law to recover judgment for money due. It is a harsh remedy, and for that reason one who brings the action must pay the damage sustained by the adversary in case the proceedings are wrongfully instituted. In many cases the defendant in the proceedings cannot be adequately compensated for the damages sustained, and we think the courts are amply justified in holding that attorney's fees should be allowed the defendant in case of a wrongful attachment. It is clear that a stranger to a suit whose property is wrongfully attached may recover damages, as we have shown, and we see no reason why necessary attorney's fees incurred in procuring the release of property from a wrongful attachment should not be considered as an item of such damage. If it is an item of damage in the one case, why not in the other? He who levies upon the property of a stranger does so at his peril. Such stranger should be saved harmless, and this cannot be done unless he is reimbursed his outlay in procuring the release of his property. It is no doubt true that cases may arise where this rule may work a hardship, but that may be said of every rule.

4. It is next contended that the question of attorney's fees is *res adjudicata*. We think not, under the circumstances. There was no pleading in the federal court wherein the question of attorney's fees was made an issue; and, if that matter might have been adjudicated under appropriate issues, no issue of that character having been involved, and the question not having been tried and the court not having undertaken to consider it, there is nothing upon which to sustain the contention. (*Gulling v. Washoe County Bank*, 29 Nev. 259, 89 Pac. 26.)

Perceiving no error in the record, it is ordered that the judgment appealed from be affirmed.

MCCARRAN, C. J.: I concur.

SANDERS, J., did not participate.

Argument for Appellant

[No. 2255]

D. C. WHEELER, INCORPORATED (A CORPORATION), RESPONDENT, v. O'BRIEN BROTHERS, APPELLANTS.

[165 Pac. 339]

1. ANIMALS—UNLAWFUL GRAZING—SPECIAL DAMAGES—PLEADING.

Under allegations that defendants during month of March grazed sheep upon plaintiff's property, thereby injuring it for grazing purposes, damages may be based upon the land's value for grazing purposes during the lambing season, without such damages being specially pleaded, where the land was most useful for this purpose.

2. ANIMALS—UNLAWFUL GRAZING—EVIDENCE.

In damage action for unlawfully grazing sheep, defendants' testimony that plaintiff's sheep also grazed upon defendants' property to their damage held not to require a finding of damage for defendants.

3. APPEAL AND ERROR—RESERVING GROUNDS FOR REVIEW—EVIDENCE—SUFFICIENCY OF OBJECTION.

Rulings upon evidence cannot be reviewed when challenged only by general objections.

APPEAL from Second Judicial District Court, Washoe County; *Mark R. Averill*, Judge.

Action by D. C. Wheeler, Incorporated, against O'Brien Brothers. Judgment for plaintiff, and defendants appeal. **Affirmed** (COLEMAN, J., dissenting in part).

George Springmeyer, for Appellants:

The trial court erred in allowing special damages that had not been specifically pleaded. It is a fundamental and generally accepted rule of evidence that proof of special damages cannot be introduced unless such special damages have been specially pleaded. "If the damages sought to be recovered are those known as special damages, that is, those of an unusual and extraordinary nature, and not the common consequence of the wrong complained of or implied by law, it is necessary in order to prevent surprise to the defendant that the declaration state specifically and in detail the damages sought to be recovered." (13 Cyc. 176; *Sedgwick on Damages*, 9th ed. secs. 1261-1265; *Risse v. Collins*, 87 Pac. 1006; *Herrin v.*

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Sieben, 127 Pac. 328; *Pyramid L. & S. Co. v. Pierce*, 30 Nev. 237, 95 Pac. 210; *Jensen v. Pradere*, 39 Nev. 466.)

Appellants are entitled to recover on their counterclaim. They offered evidence as to the ownership of the land and trespass upon it by respondent's sheep, as alleged in the counterclaim. No contrary evidence was offered. While the law is clear, and has been established by many cases, that an appellate court will not interfere with the findings of a trial court where the evidence is conflicting, the law is equally clear that where there is no conflict in the evidence, the higher court will compel the inferior tribunal to follow the evidence. (*Merritt v. Merritt*, 40 Nev. 385.)

Even if evidence is admitted because no objection to it is made, or because improper objections are made, the court is not on that account permitted to render a judgment except in accordance with the rules of law. A general objection will not always suffice; but a general objection is always sufficient where the question is clearly improper, because then the court need not have the specific defect pointed out. "But a general objection is sufficient where the ground therefor is so manifest that the trial court could not fail to understand it, as where the evidence is clearly irrelevant or incompetent, or inadmissible for any purpose, or the objection is of such a nature that it could not have been obviated." (38 Cyc. 1365; Wigmore on Evidence, sec. 18.)

Leroy F. Pike, for Respondent:

General objections to evidence are not sufficient, "The objectionable part of evidence must be specifically pointed out, a general objection to its admission being insufficient unless it is all incompetent. An objection to evidence must be so definite as to enable the court to intelligently rule upon it and to show the opposite party the point of objection, and must be specific enough to show the trial court its harmful bearing from the standpoint of the objector." (38 Cyc. 1375, 1378; *Robinson v. Imperial S. M. Co.*, 5 Nev. 44; *Sharon v. Minnock*, 6 Nev. 377;

State v. Jones, 7 Nev. 408; *Leet v. Wilson*, 24 Cal. 399; *State v. Smith*, 33 Nev. 438.)

The preponderance of evidence supports the findings and judgment of the court. The judgment of the trial court will not be disturbed by the appellate court on the granting or refusal of a motion for a new trial on the ground that the evidence does not support the findings when it is shown that the trial court used sound discretion, even though there is conflicting evidence. (*Edwards v. Carson W. Co.*, 21 Nev. 469; *Lawrence v. Burnham*, 4 Nev. 361.)

An objection on the ground of failure to plead special damages is waived if not made when the evidence is offered. (*Lashus v. Chamberlain*, 24 Pac. 188; *Cosgriff v. Miller*, 68 Pac. 206; *Enlow v. Hawkins*, 81 Pac. 188; Ency. Pl. & Pr., vol. 5, p. 371; *Gilbert v. Kennedy*, 22 Mich. 109; Sedgwick on Damages, vol. 3, p. 1909.)

By the Court, MCCARRAN, C. J.:

This was an action for damages alleged to have been caused by the herding and grazing of 1,400 head of sheep upon a tract of land consisting of approximately 320 acres. The damage is alleged to have accrued inasmuch as "the land was thereby rendered almost valueless for grazing purposes for the year 1916 for any live stock."

The trial court found:

"That on the 29th and 30th days of March, 1916, the defendants caused the said 1,400 head of sheep to be unlawfully herded and grazed upon the lands of the plaintiff."

As a result of this unlawful herding and grazing, the court found that the plaintiff was actually damaged in the sum of \$200. The court in arriving at this sum did so by a process of reasoning which need scarcely be referred to, inasmuch as in our judgment the conclusion reached by which the court fixed the damages was correct, and the damages assessed were, as we view it, not excessive. On motion for a new trial, the court made

an order that, if plaintiff would consent that the damages be reduced to \$150, a new trial would be denied. To this the plaintiff consented. Appeal is from the judgment and from the order denying a new trial.

The record discloses that the tract in question, upon which the unlawful grazing is alleged to have taken place, was a wild unreclaimed tract, used particularly by respondent, plaintiff in the court below, during the lambing season; and the record discloses that it was especially valuable for this purpose by reason of its character and location.

Appellants here complain that the court assessed special damages, inasmuch as it found that:

"This land was more valuable, as shown by the evidence, for lambing than for grazing alone. It was worth possibly \$50 for grazing only. The evidence was conclusive that the loss per sheep for lambing purposes was \$1."

1. It is the contention of appellants that inasmuch as the *ad damnum* allegation in the complaint makes no claim for special damages by reason of the loss of grasses, herbage, or browse growing on the lands, during the lambing season, or that no special damages were alleged to the plaintiff for being deprived of the use of the lands for lambing purposes, the court was unwarranted in making its finding and conclusion as it did. In this connection appellants rely upon the rule that proof of special damages cannot be introduced unless such damages have been specially pleaded; and in this connection they assert that the trial court erroneously permitted evidence as to the special damages to plaintiff for being deprived of the use of the lands for lambing purposes, and that following this evidence the court arrived at an erroneous conclusion.

The record discloses evidence going to establish that this tract of land had been generally used by respondent for the purpose of lambing a given number of sheep, and that the tract was especially adapted to this use.

We are referred to the rule, which we believe to be one

well recognized by authority, that if the damages sought to be recovered are those known as "special damages," that is, those of an unusual and extraordinary nature and not the common consequence of the wrong complained of or implied by law, it is necessary, in order to prevent surprise to the defendant, that the declaration state specifically and in detail the damages sought to be recovered.

The rule is not applicable to this case. The damage was alleged to have been wrought during the month of March, 1916, by the wilful, malicious, wrongful, and unlawful herding and grazing of sheep upon the lands of plaintiff, thereby destroying, eating, and tramping out the grasses, herbage, and browse.

The general use to which the tract of land was put during that particular season of the year was established as being for lambing purposes. The tract of land in question might have been absolutely useless either to appellants or respondent, in so far as grazing would be concerned, at some other season of the year. The general use to which the land was applied was for grazing purposes during the lambing season. It was the fact, as determined, that the land was made useless for this purpose by the acts of appellants that constituted the basis for the damage. The general use to which the land was applied was a matter of proof, and if such disclosed, as it did, that the tract of land was generally used for lambing purposes, such evidence was, in our judgment, admissible under the pleadings. The damage accruing to respondent was the loss established as having been sustained by reason of the destruction of the herbage and grasses growing on the land during that season of the year when respondent looked to the tract to maintain a given number of sheep, namely, during the lambing season. It nowhere appears that the court, in arriving at the measure of damages, based the same upon anything other than the general value of the tract for grazing purposes during the period of the year within which its value for such purpose was especially established.

We are referred to the case of *Risse v. Collins*, 12 Idaho,

689, 87 Pac. 1006; but it will be observed that there the Supreme Court of Idaho adhered to a rule of general acceptance that the measure of damages in such cases should be the value of the crop at the time of the injury or destruction. In the case at bar, we are dealing with the value of herbage, grasses, and browse growing upon wild, uncultivated, and unreclaimed lands at a special season of the year when by reason of the nature of the tract and its location it is generally used for a special purpose. So we deem it applicable to say here that the measure of damages in such cases is and should be the value of the pasturage upon such a tract of land, taking into consideration its location and general surroundings at a time in the year when by reason of its peculiar character it is valuable for a special purpose. The same rule might not apply at another or different season of the year, and indeed might not apply to other lands differently located.

The case of *Herron v. Sieben*, 127 Pac. 323, affords no assistance in this case.

We are referred to the case of *Pyramid Land & Stock Co. v. Pierce*, 30 Nev. 237; but, inasmuch as the court in the matter at bar assessed no special damages, the rule there relied upon is not applicable here.

In the case of *Jensen v. Pradere*, 39 Nev. 466, 159 Pac. 54, a majority of this court held that in cases of this character where the land was used for pasturage only, evidence of its reasonable value for such purposes would be proper. To this we might add that if the evidence established that the use to which the land could be applied was limited to a special season of the year, as in this case during the lambing season, evidence as to the value of the land during such season and for such purpose would be proper.

There is evidence in the record, coming from competent witnesses, to the effect that damage done by appellants in herding and grazing their sheep over the particular tract of land at the particular season of the year would amount to a thousand dollars. Another witness placed

the damage at a dollar per head. The court in fixing the damages appears to have ignored all of this testimony as well as all evidence tending to establish special damages.

2. Appellants assigned error to the action of the trial court because that tribunal found that the plaintiff did not cause any sheep to be herded or grazed upon the lands of defendants. In this respect it may be noted that by way of cross-complaint appellants here had alleged damages accruing from the acts of respondent in herding sheep on the lands of appellants. It is the contention of appellants that evidence supporting this allegation was offered by them and not contradicted. Perhaps the strongest evidence supporting the allegation of appellants as to damages in this respect, if any evidence supported such allegation, is to be found in the record of the testimony of appellant, Will O'Brien, in which he relates that he saw sheep belonging to respondent on a certain 40-acre tract in section 19 which he claims to have had under lease at that time. The only attempt to fix the damage claimed by appellant appears in the following interrogatories and answers:

"Q. How many sheep were there in that band? A. Well, I don't know; of course they lamb close to a thousand head I should judge, up there, lambing time, you know. They split them up; may have been 600, may have been 700, I am not sure.

"Q. What was the damage done to the land you had under lease by the plaintiff's sheep grazing upon it in the manner you have stated? A. Well, I had the place along the ditch where I got water—\$300, I believe.

"Q. What did you say the damages were? A. About \$300, I guess.

"Q. How do you fix the damages? A. Well, according to the size of the band of sheep and the way that they had sued me.

"Q. You fix the damages on the same basis as the damages they claim? A. Yes, they figure \$1,000 for my bunch that I had.

Coleman, J., concurring

"Q. That is the only basis you have of fixing that \$300?

A. Well, they destroyed just as much of the browse where I was as I destroyed on them, if I was ever on that.

"Q. Assuming that you had been over? A. Yes, the same identical thing."

It is needless to say that from this record, uncertain and indefinite as it is on the question raised by the cross-complaint of appellants, the court had before it nothing in the way of facts upon which it could have found damages accruing. Hence we fail to discover error in the act of the trial court in determining as it did.

3. Many of the errors complained of, pertaining to the admission of evidence over the objection of appellants, lose force by reason of the form of the objection; and we deem it not inappropriate to suggest that, in the light of the rule often asserted by this court, appellants cannot be heard to complain where the error relied upon was brought to the attention of the trial court only by an objection general in its nature. (*Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44; *Sharon v. Minnock*, 6 Nev. 377; *State v. Smith*, 33 Nev. 438, 117 Pac. 19.)

The judgment of the trial court is sustained.

It is so ordered.

SANDERS, J.: I concur.

COLEMAN, J., concurring in part:

I concur in the judgment of affirmance, but not in the views expressed in the opinion of the learned chief justice. I take the view that the contention of counsel for appellant as to special damage is correct; but since the attorney who tried the case in the lower court permitted some of the testimony complained of to be admitted in evidence without objection, and since the objections which were made to the rest of the evidence were on the ground that it was "irrelevant, incompetent, and immaterial," and did not specify wherein it was irrelevant, incompetent, and immaterial, I am of the opinion that the point urged on this appeal cannot be

Coleman, J., concurring

considered. The court, in the case of *Sigafus v. Porter*, 84 Fed. at page 433, 28 C. C. A. at page 449, in considering this question, said:

"The stock objection 'incompetent, irrelevant, and immaterial,' covers a multitude of sins. There is hardly an objectionable question but what can be classified under one or other of these heads. Sometimes the real nature of the objection is so plain that the general phrase will be quite sufficient to indicate it; indeed, it may be quite apparent without any statement of the grounds of objection at all. But there are many other objections which rest upon some particular theory of the case, or upon some single fact in proof, which a judge may readily forget in the course of a long and intricate trial. It is only fair in such cases to require counsel to state clearly to the trial judge on what ground it is that they object. Certainly, it is not fair to allow such a general dragnet as 'incompetent, irrelevant, and immaterial' to be cast over every bit of evidence in the case which counsel would like to keep out, and then to permit counsel, upon careful analysis of the printed narrative of the trial, to formulate some specification of error not thought of at the time, and which, if seasonably called to the court's attention, might have been avoided or corrected."

See, also, 1 Wigmore on Evidence, p. 57, sec. 18; Jones on Evidence, sec. 896; *Noonan v. Mining Co.*, 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061; *Patrick v. Graham*, 132 U. S. 627, 10 Sup. Ct. 194, 33 L. Ed. 460; *Topitz v. Hedden*, 146 U. S. 252, 13 Sup. Ct. 70, 36 L. Ed. 961; *New York El. Eq. Co. v. Blair*, 79 Fed. 896, 25 C. C. A. 216; *Culmer v. Clift*, 14 Utah, 291, 47 Pac. 85; *Cornell v. Barnes*, 26 Wis. 473, 480; *Bundy v. Sierra Lumber Co.*, 149 Cal. 772, 87 Pac. 622; *Starkweather v. Dawson*, 14 Cal. App. 666, 112 Pac. 738; *Rush v. French*, 1 Ariz. 99, 123 Pac. 816; *Harris v. Lumber Co.*, 97 Ga. 465, 25 S. E. 519; 38 Cyc. pp. 1375, 1376.

Argument for Appellant

[No. 2254]

**GEORGE OLIVER ROBERSON, APPELLANT, v.
GEORGE D. KILBORN, RESPONDENT.**

[165 Pac. 220]

**1. DEPOSITIONS—ANSWERING QUESTIONS—CONTUMACIOUS REFUSAL—
PENALTY—STRIKING PLEADING.**

Where plaintiff in giving his deposition refused under advice and command of his counsel to answer certain questions until the court had ruled that they should and must be answered, his refusal was not contumacious, nor was he a recalcitrant witness, and it was error, before ruling that the questions must be answered, to strike his complaint.

**2. DEPOSITIONS—ANSWERING QUESTIONS—CONTUMACIOUS REFUSAL—
PENALTY—STRIKING PLEADING—DISCRETION OF COURT.**

Conceding questions propounded in taking a deposition were legal and pertinent, it was an arbitrary exercise of authority to enter judgment against defendant before giving him an opportunity to answer the questions propounded and ruled to be proper.

APPEAL from Second Judicial District Court, Washoe County; *T. F. Moran*, Judge.

Suit by George Oliver Roberson against George D. Kilborn. From an order striking the complaint and giving judgment for defendant, plaintiff appeals. **Reversed and remanded**, with instructions.

George Springmeyer, for Appellant:

A witness is privileged to refuse to answer illegal and impertinent questions on a deposition. (Rev. Laws, 5436, 5437, 5456; *Fenn v. Railroad*, 122 Ga. 280; *Ex Parte Jennings*, 60 Ohio St. 319; *McFarland v. Muscatine*, 98 Iowa, 199; *Meyer v. Manhattan L. Ins. Co.*, 144 Ind. 439; *Robins v. Brockton St. Ry. Co.* 180 Mass. 51; *Gunn v. Railway Co.*, 171 Mass. 417; *Rogers v. Superior Court*, 78 Pac. 344.)

In the taking of a deposition before a commissioner, where a witness refuses to answer questions on the ground that they are improper, the proper practice is for the commissioner to certify the questions to the court for a ruling. (*Chew v. Bank*, 2 Md. Ch. 210; *Vincent v. Huff*, 4 S. & R. 298; *Clark v. Allen*, 43 U. C. I. B. 242; *Citizens'*

Bank v. Alexander, 73 N. E. 279; *Van Dyke v. Doughty*, 140 N. W. 627; *Burns v. Superior Court*, 73 Pac. 597.)

The complaint of the plaintiff should not be dismissed where, upon the taking of his deposition, he refused to make answer to all questions, under the belief that he had the right so to refuse, and where he expressed his willingness to testify if the questions should be held to be proper. (*Coburn v. Tucker*, 21 Mo. 219; *Hovey v. Elliott*, 167 U. S. 409; *Lawson v. Mining Co.*, 86 Pac. 1120; *Summerville v. Kelliher*, 77 Pac. 889; *Foley v. Foley*, 52 Pac. 122; *State v. Clancy*, 61 Pac. 987; *Sibley v. Sibley*, 78 N. Y. Supp. 743; *Ehlers v. Stoeckle*, 37 Mich. 261.)

Homer Mooney, for Respondent:

When a certified deposition is presented to the court, showing that a plaintiff-witness has refused to give his deposition, the court has power to declare the fact, strike the complaint from the files, and enter judgment for costs against plaintiff. (*Maxwell v. Rives*, 11 Nev. 213; *Royer v. Harwood*, 48 Mo. App. 510.)

The court is not required to point out proper questions and give the plaintiff the privilege of answering. (*Maxwell v. Rives*, *supra*.)

The ruling of the lower court on questions declared to be proper, legal, and pertinent was correct. (*Maxwell v. Rives*, *supra*; *Richards v. Judd*, 15 Abb. Pr. R. 184; *Guenther v. Ridgway*, 143 N. Y. Supp. 961; *Funk v. Tribune*, 4 Civ. Pr. Rep. 408; *Miles v. Armour*, 239 Mo. 438, 144 S. W. 424.)

By the Court, SANDERS, J.:

George Oliver Roberson, appellant, brought suit in the district court of Washoe County against George D. Kilborn, respondent, to recover damages alleged to have been suffered by reason of the publication of an alleged libelous article in the Nevada State Journal, a daily newspaper published by respondent in the city of Reno. After service of summons, and before answer, it was

stipulated by the parties, through their respective counsel, that the deposition of appellant might be taken on application of respondent. Pursuant to the terms of the stipulation, appellant's deposition was taken, signed, sworn to, returned, and filed. Thereafter, respondent served on appellant's counsel a written notice to the effect that on the 4th day of April, 1916, he would move the court for an order striking out the complaint on file in the cause and dismissing the same, and for an order that judgment be entered in favor of respondent, on the grounds that appellant refused to give his deposition, and refused to answer as a witness questions to him propounded, and, in support of the motion, that he would rely on the papers and pleadings in the cause, including the purported deposition. The motion came on for hearing, and was submitted to the court for its decision on the 4th day of April, 1916. On said date, the court, it appears, caused to be made and entered the following minute order:

"Be it further remembered, that in open court, on April 4, 1916, defendant duly moved the court for an order striking out plaintiff's complaint and for judgment for defendant on the grounds stated in the aforesaid notice of motion; that plaintiff, acting by and through his counsel, then and there offered to make answer on his deposition to all questions and interrogatories which the court might declare to be proper, competent, relevant, or material, and which the court might direct, require, or order him to answer; that said matters were then and there duly argued by respective counsel for plaintiff and defendant, and submitted to the court for its decision."

Thereafter, on the 24th day of August, 1916, the court made its ruling, decision, and order sustaining the motion, upon the following grounds (excerpt from decision):

"Without going further into deposition and picking out each question separately, we think we have pointed out enough in connection with what we have observed in the record of the proceeding to warrant the court in making a

ruling on this motion. The alleged libel is set out merely to show what relevancy the questions propounded by defendant's counsel could have to same. All the questions mentioned in this opinion are relevant and should have been answered. The plaintiff has refused to answer proper questions to such an extent as to defeat the taking of his deposition.

"For the reasons given, the complaint of plaintiff is stricken out, and judgment is given against him. It is so ordered."

The taking of the deposition of a party to a suit before trial is strictly a statutory proceeding, embraced by chapter 54 of the civil practice act (Rev. Laws, 5419-5449). Section 479 of the act provides that, if a party refuse to give his deposition before trial, his pleading may be stricken out and judgment be taken against him. Section 496 of the act provides that refusal to answer as a witness or to subscribe a deposition may be punished as a contempt by the court or officer; and, if the witness be a party, his complaint may be dismissed or his answer stricken out. Whether a court may, under section 496 of the act, strike a pleading of a party witness before his being adjudged guilty of a contempt—*quære*.

1. The court based its ruling and decision upon the ground that appellant refused to answer proper questions to such an extent as to defeat the taking of his deposition. It is not pretended that the witness refused to give his deposition. It clearly appears from the record that the excuse of the witness for not answering the questions was that under the advice of his counsel and, in fact, by reason of the command of his counsel, he declined to answer. His refusal to answer was not, therefore, contumacious; nor can it be said that he was a recalcitrant witness. He proffered his willingness to answer the questions when ruled upon by the court, and, upon the hearing of the motion, it appears that his counsel offered to make answer to all questions propounded which the court should rule to be pertinent and legal, and which the court might direct, require, and order him to answer.

The facts thus presented are entirely different from those the court had to deal with in the case of *Maxwell v. Rives*, 11 Nev. 220. There the examination was conducted in the presence of the court, and the witness refused, and continued his refusal, to answer questions ruled by the court to be proper. Here the witness refused to answer pending a ruling by the court, and his excuse, as before stated, for not answering, was that he did so under the advice of his counsel.

2. Conceding, but not deciding, that the questions propounded were legal and pertinent, it was an arbitrary exercise of authority to enter judgment against appellant before giving him an opportunity to answer the questions ruled to be proper.

In applying a statute in a proceeding of this kind to a similar state of facts as here presented, the Supreme Court of Indiana decided that it is only where a party refuses to attend and testify that he may be punished for a contempt, and his pleadings stricken out. If it appears that he did not attend and testify, and merely refused to answer certain questions under the advice of his counsel, without any disrespect to the court, but because there is nothing in the complaint upon which to base such questions, it will be error to punish him as for contempt, or to strike out his pleadings. (*Chaffin v. Brownfield*, 88 Ind. 305.)

In the case of *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134, cited by respondent in support of the regularity of the judgment here complained of, the court's overruling of a motion to strike the interrogatories to be propounded to a party witness was in effect an approval by the court of the interrogatories. In that case the court said that motions of this character are directed to the discretion of the trial court, and its action in passing thereon will not be reversed unless the record shows an abuse of discretion.

No harm could have resulted to respondent by giving to appellant an opportunity to answer the questions when the court had ruled them to be proper. In fact, it might have enabled respondent to obtain the information which

Points decided

he professed to want. But to refuse to give appellant an opportunity to answer the questions when so ruled upon might deprive appellant of a constitutional right. (*Citizens' National Bank v. Alexander*, 34 Ind. App. 597, 73 N. E. 279; *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 86 Pac. 1120.)

The judgment is reversed, and the cause remanded. The district court is instructed to revoke the order striking appellant's complaint and to enter an order reinstating the same.

Per Curiam:

Petition for rehearing denied.

[No. 2275]

ELLEN C. O'DONNELL, PETITIONER, v. THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, E. A. DUCKER, JUDGE OF SAID DISTRICT COURT, AND CHRIS. WOLF, GUARDIAN OF ESTATE OF ELLEN C. O'DONNELL, RESPONDENTS.

[165 Pac. 759]

1. APPEAL AND ERROR—RIGHT TO APPEAL—STATUTE.

It is not lightly to be assumed that from failure or omission of a special act to provide for an appeal the legislature intended to deny such right to any person whose civil and legal rights are involved.

2. INSANE PERSONS—APPOINTMENT OF GUARDIAN—RIGHT TO APPEAL.

Const., art. 6, sec. 4, vests the supreme court with appellate jurisdiction in all cases in equity. Rev. Laws, 4832, is to the same effect. Section 4833 empowers the supreme court to review on appeal a judgment in a proceeding commenced in a district court when the matter in dispute is embraced in the general jurisdiction of the supreme court. Section 5329 provides that an appeal may be taken from a final judgment or special proceeding commenced in the court in which the judgment is rendered. Section 6162 provides for petition for the appointment of a guardian for insane persons. *Held*, that such proceeding is equitable, and the judgment appointing the guardian for a mentally enfeebled person is final, so that an appeal lies.

Argument for Petitioner

3. PROHIBITION—RIGHT TO REMEDY.

Where a stay of proceedings is had, and the court undertakes to exercise an unauthorized jurisdiction pending the stay, prohibition is the proper remedy.

4. INSANE PERSONS—APPOINTMENT OF GUARDIAN—REVIEW—STAY OF PROCEEDINGS—UNDERTAKING ON APPEAL.

As procedure under Rev. Laws. 6162, is not a case provided for in civil practice act, secs. 404, 405, 408, and 409 (Rev. Laws. 5346, 5347, 5350, and 5351), the perfection of an appeal by giving the undertaking as prescribed by section 404 stays proceedings in the court below upon the judgment and order appealed from, under specific provision of Rev. Laws, 5355.

ORIGINAL PROCEEDING for prohibition by Ellen C. O'Donnell against the Sixth Judicial District Court of the State of Nevada in and for Humboldt County, and others. **Writ issued.**

Salter & Robins, for Petitioner:

We will not dispute the proposition that the right of appeal is one based on statute, but the statutes of this state positively and in unequivocal terms provide for an appeal in cases like the one at bar; and it makes no difference whether it be a "special proceeding" or an "action"; it is either one or the other. "An appeal may be taken from a final judgment in an action or special proceeding commenced in the court in which the judgment is rendered." (Rev. Laws, 5329.)

"The supreme court shall have jurisdiction to review upon appeal a judgment in an action or proceeding commenced in the district court when the matter in dispute is embraced in the general jurisdiction of the supreme court." (Rev. Laws, 4833; *State v. Ducker*, 35 Nev. 214.)

If the proceeding had before the lower court was not "an action," it could have been nothing more than a "special proceeding." "The term 'special proceeding' is used in the codes of practice of many of the states in contradistinction to 'action.' It may be said generally that any proceeding in a court which was not under the common law and equity practice either an action at law or a suit in chancery, is a special proceeding." (*In Re Central Irr. Dist.*, 49 Pac. 357; *Methodist Church v. Ely*,

Argument for Respondents

47 N. E. 537; 1 C. J. 1010; *State v. District Court*, 72 Pac. 613; *Lawrence v. Thomas*, 51 N. W. 11; 21 Cyc. 38; *In Re Josephs Estate*, 118 Cal. 660; *Clough v. Clough*, 51 Pac. 513.)

So far as petitioner is concerned, the order of the lower court is a final judgment, and from it an appeal lies. (Rev. Laws, 5238; *In Re Smith Estate*, 55 Pac. 249; *Sharon v. Sharon*, 7 Pac. 462; *State v. District Court*, 72 Pac. 615; *Guardianship of Mary Winkleman*, 9 Nev. 303.)

The undertaking on appeal acts as a stay, and an order made by the lower court after its filing is in excess of jurisdiction. (*Silver Peak v. District Court*, 110 Pac. 503.)

Prohibition is the proper remedy. (*Hynes v. Coburn*, 120 Pac. 26; *Woods Case*, 29 Pac. 1108; *In Re Moss*, 53 Pac. 357.)

Callahan & Brandon, for Respondents:

It is necessary for the legislature to provide for appeals in guardianship matters before any appeal will lie from an order made under the guardianship act. "The right of appeal to this court is one based entirely on statute, and this court is prohibited from taking jurisdiction unless the party appealing has, in the first instance, the statutory right of appeal." (*State ex rel. Sparks v. State B. & T. Co.*, 137 Pac. 400.)

Whether or not the constitution authorizes legislation for appeals in matters of guardianship is immaterial, because under the decisions it would be inoperative without legislation enabling appeals to be taken. (Hayne, *New Trial and Appeal*, vol. 2, sec. 181; *Estate of Moore*, 86 Cal. 58; *Estate of Walkerly*, 94 Cal. 352; *Estate of Hickey*, 121 Cal. 378; *Estate of Cahill*, 142 Cal. 628.)

No appeal lies from an order of the county court appointing a guardian for a lunatic or idiot (*Willis v. Lewis*, 27 N. C. 14); neither does an appeal lie from an order refusing to appoint such guardian. (*Peralta v. Castro*, 15 Cal. 511; *Estate of Dean*, 62 Cal. 613; *Estate of Calahan*, 60 Cal. 232.)

If no appeal lies from the order of the lower court

declaring petitioner incompetent to care for her estate and appointing a guardian, the application for a writ of prohibition should be denied; but if the provision for appeals in the civil practice act applies to guardianship matters, prohibition is not the proper remedy. An order striking an undertaking to stay execution from the files, and directing the sheriff to pay money collected under garnishment in satisfaction of judgment, is a special order after judgment, and appealable. (*Southern Cal. R. Co. v. Superior Court*, 127 Cal. 417.) Since appeal lies from and is an adequate remedy to prevent execution of any order of court appointing a receiver and directing the sale by him of property of a plaintiff in a divorce action to satisfy a judgment for alimony against him, prohibition will not lie for such purpose, although the order is void as in excess of the jurisdiction of the court. (*White v. Superior Court*, 42 Pac. 471.) The writ of prohibition will issue only when there is an exercise of functions without or in excess of jurisdiction, and there is no other adequate remedy, (*Low v. Crown Point M. Co.*, 2 Nev. 75; *Turner v. Langan*, 29 Nev. 281; *McComb v. District Court*, 136 Pac. 563.) Prohibition will not issue where there is a remedy by appeal or *certiorari*. (*Silver Peak v. District Court*, 110 Pac. 503.)

By the Court, SANDERS, J.:

Ellen C. O'Donnell was declared by a judgment of the district court for Humboldt County to be mentally incompetent, by reason of extreme old age, to manage her property, and by the judgment Chris Wolf, public administrator of said county, was appointed guardian for her estate, alleged to consist of 400 acres of land in said county and \$8,500 in money, represented by two certificates of deposit in a local bank at Winnemucca, Nevada. She gave notice of appeal to this court from the judgment and an order overruling her motion for a new trial, and filed an undertaking on appeal in the sum of \$300. She now petitions this court for a writ of prohibition to

restrain the judge of said court and the guardian so appointed from enforcing, or undertaking to enforce, said judgment pending her appeal.

We are satisfied from the return of respondents that, unless restrained, they will do the things complained of, and will endeavor to take possession of the property of petitioner in disregard of and in spite of her appeal. The only question presented, therefore, is: Should the writ issue?

It is urged by respondents that an appeal is a matter purely of statutory right (*Esmeralda County v. Wildes*, 36 Nev. 526, 137 Pac. 400), and as the statute under which the proceeding was commenced in the lower court (Statutes of Nevada, 1899, p. 70) nor the general law governing appeals (chapter 46, Civil Practice Act) makes provision for an appeal in such cases, the judgment and order complained of is not appealable, and this court is therefore without jurisdiction to issue the writ. The jurisdiction of this court being thus challenged, it is incumbent upon us to consider the question as if made upon a motion to dismiss the appeal of petitioner. The several district courts of this state are vested by the constitution and statutes with original jurisdiction in all cases relating to the estates of insane persons (Const. art. 6, sec. 6; sec. 4840, Revised Laws); not necessarily persons technically insane, but those who, for any cause, are mentally incompetent to manage their property (sec. 6162, Revised Laws; 14 R. C. L. p. 567); and such courts possess general power over the appointment and removal of guardians (sec. 4849, Revised Laws). The jurisdiction thus conferred is neither special nor limited, nor is it limited or qualified by the special act which regulates the procedure for the appointment of guardians and to prescribe their duties. (Statutes of Nevada, 1899, p. 70.)

1. It is not lightly to be assumed that from the failure or omission of a special act to provide for an appeal the legislature intended to deny to the persons whose legal and civil rights are involved and affected by the act the right of appeal. The right to an appeal is a substantial

right (*Howard v. Richards*, 2 Nev. 137, 90 Am. Dec. 520), and, while it is purely statutory (*Esmeralda County v. Wildes*, *supra*), a statute will not be construed as taking away the right of appeal unless the language used clearly shows such an intent (3 C. J. 319).

"If a statute is capable of being so construed as to maintain the right of appeal without violating the well-established rules for construing statutes, it will be so construed." (*Houghton's Appeal*, 42 Cal. 35.)

2. The persons embraced by the statute in question are peculiarly "wards of chancery." Unless the statute, by express terms, necessary implication, or reasonable intentment, denies to such persons the right of appeal, it is our duty to uphold the right. But it is insisted that the general law governing appeals makes no provision for an appeal in this class of cases. In this view we do not concur. The supreme court is vested by the constitution with appellate jurisdiction in all cases in equity. (Const. art. 6, sec. 4; Rev. Laws, 4832.) This court has jurisdiction to review upon appeal a judgment in an action or proceeding commenced in a district court when the matter in dispute is embraced in the general jurisdiction of the supreme court. (Rev. Laws, 4833.) The proceeding authorized by the statute (Rev. Laws, 6162) is an equitable proceeding, and differs from ordinary actions only in procedure. It does not confer new rights, nor afford new remedies. In its essential characteristics it was an adversary proceeding in which the petitioner was the real defendant. An appeal may be taken from a final judgment or special proceeding commenced in the court in which the judgment is rendered. (Rev. Laws, 5329.) For the purposes of this application, it is not necessary to determine whether the proceeding against petitioner was "an action" or "special proceeding." It was certainly one or the other. An appeal lies from a "final judgment" in either. The judgment was a "final judgment," which operates to divest petitioner of the right to the possession, control, and management of her property. The petitioner is entitled, therefore, to prosecute her appeal here so as

to test the regularity of the proceeding by which it was sought to place her property under guardianship.

3. It is well settled that, where a stay of proceedings is had, and the court undertakes to exercise an unauthorized jurisdiction pending such stay, prohibition is the proper remedy. (3 C. J. p. 1328.)

4. The undertaking on appeal filed by the petitioner conforms to section 404 of the civil practice act, and, as the procedure authorized by section 6162, Revised Laws, is not a case provided for in sections 404, 405, 408, and 409 of the civil practice act, the perfecting of the appeal by giving the undertaking, as prescribed by section 404, stays proceedings in the court below upon the judgment and order appealed from. (Rev. Laws, 5355.)

It is argued by respondents that it is against the interest of petitioner, and against public policy, to permit petitioner to manage her property pending the time of her appeal. And it might have been suggested, by way of argument, that an appeal in such cases defeats the purpose of the statute. This position has been ruled upon adversely to respondents by the Supreme Court of California in construing a similar statute. (*Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26; *In Re Woods*, 94 Cal. 566, 29 Pac. 1108; *In Re Moss*, 120 Cal. 695, 53 Pac. 357.)

We are powerless to remedy what may be a defect or omission in the civil practice act.

Let the writ issue.

REPORTS OF CASES
DETERMINED BY
THE SUPREME COURT
OF THE
STATE OF NEVADA

JULY TERM, 1917

[No. 2278]

CHARLES F. DANFORTH, APPELLANT, *v.* MINNIE J.
DANFORTH, RESPONDENT.

[166 Pac. 127]

1. DISMISSAL AND NONSUIT—ABANDONMENT OF CAUSE.

At common law the essential of a nonsuit was abandonment of the cause by the plaintiff.

2. DISMISSAL AND NONSUIT—WHAT CONSTITUTES—DISMISSAL OR ON MERITS.

Judgment reading, "And now all and singular in the premises being seen, heard and fully understood, and the material facts alleged in the libel not sufficiently proved to the satisfaction of the court, said libel is denied," indicates, not an abandonment of the cause by plaintiff, the essential at common law of a nonsuit, but that the cause was submitted and determined on the merits.

3. DISMISSAL AND NONSUIT—WHAT CONSTITUTES—DISMISSAL OR ON MERITS.

A judgment apparently on the merits dismissing the libel will not be considered one of nonsuit on motion of defendant, as authorized by Rev. Laws, 5237, subd. 5; it not appearing defendant made any such motion.

4. JUDGMENT—RES JUDICATA—NATURE OF LAW OF OTHER STATE—PLEADING AND PROOF.

If a judgment of another state, pleaded as *res judicata*, could under a rule of that state be merely one of nonsuit, which it could not be under the laws of this state, such rule must be pleaded and proven.

Argument for Appellant

5. DIVORCE—ACTION—NECESSITY OF ANSWER.

An answer in divorce is not necessary for a judgment on the merits against plaintiff.

6. COURTS—PRESUMPTION AS TO JURISDICTION.

The presumption in favor of regularity of proceedings in a court of general jurisdiction, necessary to authorize it to act, does not apply in a proceeding not according to the common law.

7. COURTS—PRESUMPTION AS TO JURISDICTION—DIVORCE PROCEEDINGS.

An action for absolute divorce is a proceeding not according to common law, to which the presumption in favor of regularity of proceedings in a court of general jurisdiction, necessary to authorize it to act, does not apply.

8. JUDGMENT—FOREIGN DECREE—PLEADING AND PROOF.

While under Rev. Laws, 5070, the answer pleading as *res judicata* a judgment of a court of another state, denying divorce, as to which no presumption of regularity of proceedings obtains, need not plead the jurisdictional facts, yet, the reply denying the rendering of the judgment, they must be proven, except those admitted by the reply.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Suit by Charles F. Danforth against Minnie J. Danforth. From a judgment sustaining a plea of *res adjudicata*, plaintiff appeals. **Reversed and remanded.**

Lee J. Davis and Sweeney & Morehouse, for Appellant:

Actions for divorce were unknown to the common law, and the entire jurisdiction of courts in the United States is purely and wholly statutory in matters of divorce. The judgment of the lower court should, therefore, be reversed, as the Maine judgment is not a bar to the present action.

The Maine judgment was simply one of nonsuit. The case was not decided upon the merits, and the judgment is no bar to another action. (*Pendergrass v. York Mfg. Co.*, 76 Me. 509.) Before a dismissal or judgment of denial of plaintiff's cause of action can be a bar, the facts must be adjudged in favor of the defendant. That is, the court must review the facts and find upon those facts that the defendant is entitled to judgment. Otherwise the ruling is one of law only and the merits are not decided or passed upon. "A nonsuit is the result of an

Argument for Appellant

abrupt termination of an action at law. It is the name of a judgment given against the plaintiff when he is unable to prove his case, or when he refuses or neglects to proceed with a trial of a cause after it has been at issue, without determining such issue. (16 Am. & Eng. Ency. Law, 721.) The effect of a nonsuit is to defeat the action and give costs to the defendant, but the plaintiff may commence a new action for the same cause. It is a settled and inflexible rule that a judgment of nonsuit is not a judgment on the merits, and therefore is no bar to another suit upon the same cause of action. (Black on Judgments, sec. 699.)

The dismissal of a cause for want of evidence is not a judgment upon the merits, and a nonsuit for any cause is not a bar to another action upon the same cause. (*City and County v. Brown*, 96 Pac. 281; *Lewis v. Superior Court*, 105 Pac. 753; *Smith v. Superior Court*, 84 Pac. 54; *Northern P. R. R. Co. v. Spencer*, 108 Pac. 181.) It is not the recovery by the defendant that constitutes the bar or estoppel, but the decision upon the merits of the question which is in dispute between the parties. (*Hoover v. King*, 99 Am. St. Rep. 754; *Dawley v. Brown*, 79 N. Y. 390; *King v. Townsend*, 141 N. Y. 358.)

The record of the Maine court shows there was no issue made by demurrer or answer, and there was therefore nothing for the court to try, and it could not make any judgment. Its judgment, if it be one, is void. "It is the contest actually made and passed upon which gives the successful party the right to use the judgment as a bar to the same cause in a new action on a different subject-matter." (Van Fleet on Coll. Attack, sec. 17.) "From lack of contest, no question of *res adjudicata* arose. On the contrary, the doctrine of *res adjudicata* cannot arise except by virtue of some issue joined and actually contested on the trial. A judgment without an issue is void." (*Steck v. Palmer*, 41 Miss. 88; *Armstrong v. Barton*, 42 Miss. 506; *Porterfield v. Butler*, 47 Miss. 170.)

The judgments of a sister state have only such faith and credit as they have by the law of the state where

Argument for Respondent

the judgment is rendered. Therefore, our courts cannot take judicial notice of the judgment in Maine, as a valid or enforceable one, or that the same was duly made and entered, imparting full faith and credit, unless they have before them, by the pleading of the judgment or by the evidence, what the laws of Maine are. The due authentication of the record goes only to its admissibility in evidence, but does not prove its effect. The law of Maine was not pleaded or proved, and we are therefore left to construe the judgment under the laws of Nevada, the rule being that state courts will not take judicial notice of the laws of a sister state, it being necessary that they be proved like any other fact. (*Estate of Harrington*, 73 Pac. 1000; *Estate of Richards*, 65 Pac. 1034; *In Re Campbell's Estate*, 108 Pac. 669; *Scott v. Ford*, 97 Pac. 99; *Palmer v. Atchison*, 35 Pac. 630; *Cavellero v. Texas*, 42 Pac. 918; *Daggett v. S. P. Co.*, 103 Pac. 204; *De Vall v. DeVall*, 109 Pac. 755; *Thomas v. Robinson*, 3 Wend. 267; *Sheldon v. Hopkins*, 7 Wend. 435; *Pelton v. Platner*, 13 Ohio, 209; *Crafts v. Clark*, 31 Iowa, 77; *Wright v. Andrews*, 130 Mass. 149; *Coates v. Mackey*, 56 Md. 416.)

Roy W. Stoddard, for Respondent:

There is only one question before this court in the case at bar, which is: Does the exemplified copy of the record of the Maine court constitute a bar against the subsequent action brought by plaintiff? In order to render a matter *res adjudicata* there must be a concurrence of four conditions, namely (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of the parties to the action; (4) identity of the quality in the person for or against whom the claim is made. (Black on Judgments, vol. 2, sec. 610; *Lyon v. Perin Mfg. Co.*, 125 U. S. 698, 31 L. Ed. 839.) That these exist in the case at bar is apparent upon the face of the exemplified copy of the record of the Maine court. This being the case, the estoppel is not confined to the judgment, but extends to all steps involved as necessary steps for the groundwork upon which it may have been founded. "Where

a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion." (Black on Judgments, vol. 2, secs. 613, 614.)

When a decree of divorce is denied on the merits, the matter is *res adjudicata* between the parties in a subsequent proceeding for divorce upon the same grounds. (9 R. C. L. 463, 464; *Prall v. Prall*, 26 L. R. A. n.s. 577; *Ford v. Ford*, 108 Pac. 366; *People v. Case*, 241 Ill. 279; *Patrick v. Patrick*, 139 Wis. 463; *Stay v. Stay*, 102 Pac. 420; *Trowbridge v. Spinning*, 54 L. R. A. 204.)

A judgment rendered by a court of competent jurisdiction of the parties and the subject-matter in one state is conclusive on the merits in the courts of every other state. A party seeking to escape the effect of the judgment must assume the burden of proving and showing that jurisdiction did not in fact exist. (15 R. C. L. 887; 23 Cyc. 1573.)

The term "nonsuit" is applicable only to actions at law, as has been decided by this court in the case of *Laird v. Morris*, 23 Nev. 34, in which it is said: "A nonsuit is a result of an abrupt termination of an action at law."

It is true that the record of the Maine court, to be admitted in evidence, must be authenticated as provided by the full faith and credit clause of the United States, but when so authenticated and introduced in evidence it becomes conclusive evidence, and therefore conclusive in its effect and a complete bar to plaintiff's action in this state.

Where it is apparent on the face of the record of the former action that the question in controversy was litigated therein, as in the case at bar, the mere production of the record is sufficient. (Black on Judgments, vol. 2, secs. 505, 625; 23 Cyc. 1552, 1553; 15 R. C. L. 949, 962.)

By the Court, COLEMAN, J.:

Appellant brought suit for divorce. An answer was filed, pleading a judgment of a court of the State of Maine as *res adjudicata*, to which a reply was filed,

admitting that the Maine court had jurisdiction of divorce actions, but denying that a judgment on the merits had been rendered. Upon the trial, and after the evidence in support of the allegations of the complaint had been submitted, a certified copy of the judgment of the court of the State of Maine was offered and received in evidence, over the objection of appellant, in support of the plea of *res adjudicata* presented in the answer mentioned. After all of the evidence had been received, a judgment was rendered by the court, sustaining the plea of *res adjudicata*. It is from that judgment that an appeal is taken.

1. It is contended that the Maine judgment was nothing more than a judgment of nonsuit, and that the trial court erred in admitting it in evidence. In support of this contention, counsel quotes from the case of *Pendergrass v. York Mfg. Co.*, 76 Me. 509, and from numerous other authorities, among them the case of *Laird v. Morris*, 23 Nev. 34, 42 Pac. 11. On another phase of the case, counsel for appellant contend that, in the absence of pleading and proof as to what the law is in a sister state, we must presume that the law is the same as the law of this state. The authorities are practically unanimous in holding this to be the rule relative to the common law, but there is a wide difference of opinion on this question as to the statute law. (16 Cyc. 1084, 1085; 10 R. C. L. 895.) This court has never been called upon to lay down a rule as to what the presumption is as to the law of a sister state, and we do not deem it necessary to do so in this instance, for we are of the opinion that, no matter whether the common law or our statute controls, we are compelled to hold that the judgment of the Maine court was not one of nonsuit. At common law nonsuit was permissible only when the plaintiff did not appear to prosecute the action. Blackstone, who we believe is the most reliable authority as to the common law, says:

“When they are all unanimously agreed, the jury

return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which by the old law he is liable, as has been formerly mentioned, in case he fails in his suit, as a punishment for his false claim. To be amerced, or a mercie, is to be at the king's mercy with regard to the fine to be imposed. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be nonsuit. Therefore it is usual for the plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself; and if neither he, nor any body for him appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason for this practice is that a nonsuit is more eligible for the plaintiff than a verdict against him; for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of complaint. But in case the plaintiff appears, the jury by their foreman deliver in their verdict." (Blackstone's Commentaries, Ed. 1768, p. 376.)

From this language we gather that at the common law, when a plaintiff discovered some error or defect in the proceedings, or was unable to prove an essential fact, for want of necessary witnesses or documentary evidence, and thereupon being called, and failing to appear, his default was recorded, upon which the defendant recovered his costs. But this arising from some supposed neglect or oversight, the plaintiff was not barred from commencing a new action. In the light of this interpretation, it will be seen that at common law the one essential of a nonsuit was the abandonment of the case by the plaintiff. Strictly speaking, it seems that at common law there was no such thing as a "judgment" of

nonsuit. In *Poyser v. Minors*, 7 Q. B., Div. 329, Hush, L. J., says:

“A nonsuit at common law was nothing more than a declaration by the court that the plaintiff had made default in appearing at the trial to prosecute his suit.”

In the same case, Bramwell, L. J., says:

“There really in strictness never was a ‘judgment’ of nonsuit. No plaintiff could be nonsuited against his will. He failed to appear at the appointed time, generally at *nisi prius*—(I believe there were other stages of a cause in which there might be nonsuits)—and his nonappearance was recorded, returned to the court in banc, and then judgment was given against him that the defendant go without a day, etc.”

2. From a reading of the judgment of the Maine court, it is apparent that there the plaintiff did not abandon his action. The judgment reads, in part, as follows:

“And now all and singular in the premises being seen, heard and fully understood, and the material facts alleged in the libel suit not sufficiently proved to the satisfaction of the court, said libel is denied.”

3. This language clearly indicates to our minds, in interpreting it according to the common-law rules, that the case was submitted and determined on the merits. When we interpret this judgment under our statute, we reach the same conclusion. Section 5237, Revised Laws of 1912, lays down the conditions under which a judgment of nonsuit may be entered in this state:

“An action may be dismissed, or a judgment of nonsuit entered in the following cases:

“1. By the plaintiff himself at any time before trial, upon the payment of costs, if a counterclaim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon.

“2. By either party upon the written consent of the other.

"3. By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

"4. By the court when upon the trial and before the final submission of the case the plaintiff abandons it.

"5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the court or jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly. In every other case the judgment shall be rendered on the merits."

It is not contended that any of these conditions existed at the time of the entry of the Maine judgment, though counsel for appellant quote the fifth subdivision, and cite the case of *Laird v. Morris*, *supra*, in support of their general contention. From a reading of this subdivision, it will be seen that "upon motion of the defendant" the court may enter a judgment of nonsuit. It does not appear that the defendant made any such motion. On the other hand we may infer that defendant sought a judgment upon the merits. This court has pretty clearly laid down the condition upon which a judgment of nonsuit can be entered in this state, in the case of *Burns v. Rodefer*, 15 Nev. 63, where it said:

"The plaintiffs might have asked for a nonsuit, after their evidence was struck out (Civ. Prac. Act, sec. 151; *Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Ord v. Chester*, 18 Cal. 77); and the court might have granted one, also, *upon motion* of the defendants. But it does not appear from the judgment roll that either party asked for a nonsuit, or that either objected to a submission of the case to the jury. A nonsuit cannot be granted except upon the grounds stated in the statute and as therein provided. It could not have been granted under the *fifth* subdivision of section 151, except upon motion of the defendants. It could not have been ordered under the *fourth*, because plaintiffs did not

abandon their case, or under the *third*, because they appeared, or under the *second*, because defendants did not give their written consent."

4. Hence, as we have said, we find that whether we presume that the common law or a statute similar to our own existed in Maine, we must hold that the judgment was one upon the merits. If a different rule exists in Maine, it can be shown only by appropriate pleadings and proof.

5. It is also contended that the libellee filed no answer in the Maine action to the petition of the libellant, and that consequently there was no issue for that court to try. While it is true that it does not affirmatively appear that an answer was filed to the petition, it is also true that it does not affirmatively appear that an answer was not filed, while the judgment recites that libellee appeared by her attorney, W. H. Gulliver. But whether or not an issue was raised by an appropriate pleading is a matter of no consequence in an action for divorce. As said in *Ribet v. Ribet*, 29 Ala. 348, actions of this nature are of a triangular sort, and such a cause is never concluded as against the court, and it may and usually does satisfy its conscience regardless of the pleadings. (Bishop, Mar. & Div., sec. 314; 7 Ency. Pl. & Pr. 88.)

6. But it is contended that the trial court erred in admitting in evidence the transcript of the Maine judgment, for the reason that the answer in the case at bar does not allege the existence of certain facts essential to give the court jurisdiction to hear and determine the cause. On the other hand, respondent asserts that, since the court by which the Maine judgment was rendered was one of general jurisdiction, it will be presumed that every fact essential to give the court jurisdiction was shown. While it is a general rule that everything will be presumed in favor of a judgment rendered by a court of general jurisdiction, there are exceptions to the rule. The presumption which generally

prevails in favor of the regularity of the proceedings in a court of general jurisdiction, necessary to authorize it to act, does not apply in proceedings not according to the course of common law. This rule is so well established, and so generally recognized, that it seems useless to cite authorities to sustain it. However, a few of the authorities so holding are: *Galpin v. Page*, 18 Wall. 364, 371, 21 L. Ed. 959; *Sabariego v. Maverick*, 124 U. S. 261, 292, 8 Sup. Ct. 461, 31 L. Ed. 430; *Striker v. Kelly*, 7 Hill (N. Y.) 9; *Kelley v. Kelley*, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389; *Northcut v. Lemery*, 8 Or. 316; *Ferguson v. Jones*, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; *Knapp v. Wallace*, 50 Or. 348, 92 Pac. 1054, 126 Am. St. Rep. 747; *Pulaski Co. v. Stuart*, 28 Grat. (Va.) 872; *Richardson v. Seevers*, 84 Va. 259, 4 S. E. 712; 15 R. C. L., sec. 360, p. 883; 23 Cyc. 1578, text to note 52.

7. It is also contended by counsel for appellant that an action for divorce is not a proceeding according to the course of the common law, and that hence the Maine judgment should not have been admitted in evidence, since all the facts necessary to give the Maine court jurisdiction were not pleaded nor proven upon the trial of the case at bar in the lower court. As to the correctness of the contention that an action for an absolute divorce is a proceeding not according to the course of the common law, we think there can be no serious doubt. In 14 Cyc. at page 581, we find the rule laid down as follows:

"At the time of the establishment of the United States as an independent nation and the adoption of the common law of England by the several states, matrimonial causes in England were within the exclusive jurisdiction of the ecclesiastical courts. These courts derived their commissions from the church, and in the determination of matrimonial causes the canonical law was applied almost entirely. Ecclesiastical courts were not established in any of the United States as a part of its judicial system, and consequently up to the time of the

Opinion of the Court—Coleman, J.

creation of courts with a jurisdiction in divorce actions, ecclesiastical law relating to divorce remained unadministered for want of a tribunal.”

See, also, 9 R. C. L. pp. 261, 262; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; *Northcut v. Lemery*, *supra*; *Kelley v. Kelley*, *supra*; *Steele v. Steele*, 35 Conn. 48; *McGee v. McGee*, 10 Ga. 477; *Olin v. Hungerford*, 10 Ohio, 268; *Cast v. Cast*, 1 Utah, 112.

8. But under section 5070, Revised Laws of Nevada, 1912, we do not think it necessary, in an action upon a judgment of a court of special or limited jurisdiction of a sister state, to plead the jurisdictional facts, though they have to be proven in case the reply denies the allegation of the rendition of the judgment, unless the reply specifically admit certain jurisdictional facts. (*Etz v. Wheeler*, 23 Mo. App. 449; *Bruckman v. Tausig*, 7 Colo. 561, 5 Pac. 152; *Abb. Trial Brief*, 2d ed. sec. 339; *Graggoo v. Graham*, 9 Ind. 212; *Archer v. Romaine*, 14 Wis. 375.) See, also, *Phelps v. Duffy*, 11 Nev. 80, 85.

Since the reply which was filed by appellant to respondent's answer denied the rendering of the judgment pleaded, it was incumbent upon the defendant to prove all of the jurisdictional facts except the allegation in the answer that the Supreme Judicial Court of Androscoggin County, Me., in which the judgment pleaded was rendered, had jurisdiction in actions for divorce, as that allegation in the answer is admitted in the reply.

For the error committed in admitting in evidence a certified copy of the judgment of the Maine court, when evidence of certain jurisdictional facts had not been introduced, the judgment is reversed, and the case is remanded for a new trial.

Points decided

[Nos. 1944 and 1967]

**ANGUS MCLEOD, RESPONDENT, v. MILLER & LUX,
PACIFIC LIVESTOCK COMPANY, JOHN B.
GALLAGHER, AND J. C. SNYDER, ADMINIS-
TRATOR OF THE ESTATE OF CHARLES SNYDER,
DECEASED, APPELLANTS.**

[153 Pac. 566; 167 Pac. 27]

1. EVIDENCE—OPINIONS—ULTIMATE FACT—EXCLUSION.

Where, in an action for the overflow of plaintiff's ranch by defendant's dam, nonexpert witnesses testified in detail to the facts as to previous overflows, and the location of various dams and ditches was minutely described by them, the opinion of such witnesses as to whether defendants' dam caused the overflow should have been excluded, since witnesses cannot testify to matters of ultimate fact, except where it is impossible for them to detail the evidentiary facts so as to enable the jury to draw a conclusion.

2. EVIDENCE—PHYSICAL LAW—REFUTATION.

Where the testimony of witnesses is refuted by physical law or matters of common knowledge, no probative force can be allowed such testimony.

3. EVIDENCE—EXPERTS—ULTIMATE FACTS.

Where, because they are unknown, it is impossible to apply fixed natural laws to the solution of an issue, expert testimony may be considered as well as facts established by the testimony of other witnesses as the best means available of determining the truth.

4. WATERS AND WATERCOURSES — FLOWAGE — INDEPENDENT ACTS — LIABILITY.

Where the dam of other parties in conjunction with that of defendants caused the overflow of plaintiff's ranch, defendants were not liable for the whole damage, since, when two or more parties act each for himself introducing the result complained of, they cannot be held liable for the acts of each other.

5. WATERS AND WATERCOURSES — OVERFLOW — FUTURE INJURY — PROPHECY.

In an action for injury to plaintiff's ranch caused by an overflow from defendants' dam, it was error to allow testimony of a mere prophecy made by a third person to the witness several years before the action that the dam if constructed higher would ruin plaintiff's land.

6. EVIDENCE—OPINIONS—EXTENT OF DAMAGE.

In an action for the overflow of plaintiff's ranch from defendants' dam, it was error to allow a witness to give his opinion as to the extent of the damage done; the proper method being to have the witness testify to the value of the ranch before and after the overflow.

Argument for Appellants

7. DEPOSITIONS—READING BY OTHER PARTY—OBJECTION BY PARTY TAKING.

Where testimony legally objectionable in substance was elicited from the plaintiff on cross-examination by his attorneys in his deposition taken by defendants, and the deposition was read in evidence by plaintiff as provided for by Comp. Laws, 3504, thereby making the deposition plaintiff's own evidence under the provision to that effect of section 3505, an objection made by defendants on the trial to the admission of such objectionable testimony should have been sustained, though the deposition was taken on defendants' motion, since, under a further provision of section 3504, the evidence taken in a deposition is subject to all legal exceptions.

8. DEPOSITIONS—TESTIMONY—OBJECTION AT TRIAL.

The objection to such substantially inadmissible evidence was properly made at the trial instead of at the taking of the deposition, under the provision of Comp. Laws, 3504, that depositions may be used upon the trial subject to all legal exceptions.

ON REHEARING

1. EVIDENCE—OPINION—ULTIMATE FACT.

In an action for the overflow of plaintiff's ranch by defendants' dam, where nonexpert witnesses testified in detail to the facts as to previous overflows, and the location of various dams and ditches was minutely described by them, the opinions of such witnesses as to whether defendants' dam caused the overflow should have been excluded, as witnesses cannot testify to matters of ultimate fact, except where it is impossible for them to detail the evidentiary facts so as to enable the jury to draw a conclusion.

APPEAL from First Judicial District Court, Lyon County; *Frank P. Langan*, Judge.

Action by Angus McLeod against Miller & Lux, Pacific Livestock Company, John B. Gallagher, and J. C. Snyder, administrator of the estate of Charles Snyder, deceased. From a judgment for plaintiff, defendants appeal. **Reversed** (MCCARRAN, J., dissenting).

W. A. Massey, Edward F. Treadwell, Cheney, Downer, Price & Hawkins, and *Charles B. Henderson*, for Appellants:

The complaint does not state a cause of action, the findings do not support the judgment, and the facts do not show any legal liability. No direct trespass is alleged or claimed, nor is it alleged or claimed that the dam

Argument for Appellants

directly overflowed the land. If injury is merely caused indirectly by lawful act, there can be no recovery in the absence of negligence. The maintenance of a dam in a watercourse of the State of Nevada for the diversion of water for irrigation is a lawful act. (*Bliss v. Grayson*, 56 Pac. 231; *Fresno v. Fresno Canal Co.*, 98 Cal. 179; *Shoemaker v. Hatch*, 13 Nev. 261.)

The complaint fails to state a cause of action, because it contains no allegation that any of the defendants did anything which caused the river to fill with sand, or that the dam was in the river, or of ownership of plaintiff's land when the dam was erected. A person is not responsible for a trespass committed by his predecessor and grantor in the ownership of land.

Where a nuisance is erected upon land, a suit to abate the nuisance cannot be maintained against a grantee of the land unless he is first given notice to abate the same, and in the complaint such notice must be pleaded, and it must be proved at the trial. (2 Farnham on Waters, sec. 566; *Plumer v. Harper*, 14 Am. Dec. 333; *Castle v. Smith*, 36 Pac. 859.)

Any person has the right under the acts of Congress to erect dams on the public domain, and to back the water up the stream on public land, and successors in interest take the land subject to the easement of the dam. (*Shoemaker v. Hatch*, 13 Nev. 26; *Natoma W. & M. Co. v. Hancock*, 101 Cal. 42.)

Damages resulting from the doing of a lawful act can be recovered only in case of negligence. (*Williams v. Michigan C. R. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59; *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Hoffman v. Tuolumne Water Co.*, 10 Cal. 413; *Wolf v. St. Louis Ind. W. Co.*, 10 Cal. 541; *Todd v. Cichell*, 17 Cal. 97; *Everett v. Hydraulic F. T. Co.*, 23 Cal. 225; *Campbell v. Bear River Co.*, 35 Cal. 679; *King v. Miles City I. D. Co.*, 16 Mont. 463, 50 Am. St. Rep. 506; *White v. Spreckels*, 101 Pac. 920; *Spencer v. Campbell*, 9 W. & S. 32; *Losee v. Buchanan*, 10 Am. Rep. 623; *Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep.

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394; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 Am. St. Rep. 475; *Garland v. Towne*, 55 N. H. 55; *Hopkins v. Nutte Co.*, 13 Mont. 223, 40 Am. St. Rep. 438; 13 Am. & Eng. Ency. Law, 411, 413, 443; *Longabaugh v. Virginia City Water Co.*, 9 Nev. 271; *Stewart v. Birchfield*, 12 Cal. App. Dec. 203; *Durgin v. Neal*, 82 Cal. 595; *Hannahan v. St. Paul Co.*, 5 Dak. Tr. 22; *Parrott v. Wells*, 15 Wall. 524, 21 L. Ed. 206; *Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. Rep. 375; *Holyoke Water P. Co. v. Conn. R. Co.*, 52 Conn. 570; 17 Am. & Eng. Ency. Law, p. 512; *China v. Southwick*, 12 Me. 238; *Proctor v. Jennings*, 6 Nev. 83; *Smith v. Agawam Canal Co.*, 2 Allen, 355; *Shrewsbury v. Smith*, 12 Cush. 177; *Livingston v. Adams*, 8 Cow. 175; *Baily v. Mayor*, 3 Hill, 531, 2 Denio, 433; *Lapham v. Curtis*, 5 Vt. 371; *Knoll v. Light*, 76 Pa. St. 268; *Moore v. Berlin M. Co.*, 74 N. H. 305, 67 Atl. 578, 124 Am. St. Rep. 968.)

A complaint is insufficient to authorize damages on account of the maintenance of a dam, where it fails to allege in general terms, as an ultimate fact, negligence of defendants in maintaining the dam. (*City Power Co. v. Fergus Falls*, 128 N. W. 817.)

If a dam is a lawful structure, there is liability for damage to others only in case of negligence. (*Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189.)

The court erred in holding that defendants could not object to a question propounded by them in a deposition when offered by the plaintiff, and that a question cannot be objected to on grounds other than those made at the time the deposition was taken. When a deposition has once been taken, it may be read in any stage of the same action or proceeding by either party, and shall be deemed the evidence of the party reading it. (Comp. Laws, 3504, 3505; 6 Ency. Pl. & Pr. 585; *Hatch v. Brown*, 63 Me. 410; *In Re Smith*, 34 Minn. 436.)

Defendants were entitled to have the damage proved in a legal and orderly way, circumscribed by the rules of evidence, and any other manner of proving damage was prejudicial to their rights. (*Crow v. San Joaquin Co.*,

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62 Pac. 562; *Edgerton v. Wolf*, 72 Mass. 453; *Roberts v. Kendall*, 29 N. E. 487; *Kyle v. Craig*, 125 Cal. 107.)

Testimony of witnesses by deposition is subject to the same general rules of exclusion for irrelevancy, immateriality and incompetency, as if it were given in open court. (Am. & Eng. Ency. Law, p. 363; 6 Ency. Pl. & Pr., p. 596.)

Objections to the answers of witnesses made in depositions, as hearsay, secondary, or irrelevant evidence, may be made when the testimony is offered. (*Woolsey v. McMahon*, 46 Tex. 63.)

Objections to the competency of deponent, or to the competency of the questions or answers, may be made when the deposition is offered at the trial. (*Leavitt v. Baker*, 19 Atl. 86; *Lord v. Moore*, 37 Me. 208; *Palmer v. Crook*, 73 Mass. 574; *Horseman v. Todhunter*, 12 Iowa, 230; Wigmore on Evidence, sec. 18, vol. 1, p. 54; *Laurance v. Fulton*, 19 Cal. 683; *Nicholson v. Tarpey*, 89 Cal. 617.)

The court erred in its instructions in regard to the contributing causes by acts of third parties. The general rule of law is that when two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence, so that it cannot be attributed to that cause for which he is answerable. (*Marble v. City of Worcester*, 4 Gray, 395; *Slater v. Mersereau*, 64 N. Y. 138; *Chipman v. Palmer*, 77 N. Y. 51; *Schneider v. Second Ave. R. R. Co.*, 59 N. Y. Supp. 556; *Blaisdell v. Stephens*, 14 Nev. 17; *Sloggy v. Dilworth*, 36 N. W. 451, 8 Am. St. Rep. 656; *Swain v. Tenn. Co.*, 78 S. W. 93; *Draper v. Brown*, 91 N. W. 1001; *Sellick v. Hale*, 47 Conn. 260.)

The court erred in the admission of evidence, particularly evidence based upon memorandum. A memorandum to be competent evidence must have been made at

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or shortly after the time of the transaction, and it must appear that the witness knew at the time it was made that it was correct. (*State v. Bacon*, 98 Am. Dec. 616.)

Declarations of a person through whom the defendant traces his title are inadmissible where the evidence fails to disclose his possession at the time, or whether the declarations were made before or after he parted with his title to the land. (*Harrell v. Culpepper*, 47 Ga. 635.) *Prima facie* existence of privity must be shown, as preliminary to admitting statements of persons said to stand in that relation. (*Aiken v. Cato*, 23 Ga. 154.)

Evidence essential to plaintiff's recovery cannot be withheld and presented for the first time in rebuttal. (*Moehn v. Moehn*, 105 Iowa, 710, 75 N. W. 521.)

The court erred in permitting witnesses to give their opinions on the two ultimate questions in the case.

An expert is a person having special knowledge and skill in the particular calling to which the inquiry relates. (*Hammond v. Woodman*, 66 Am. Dec. 228; *Rogers*, Expert Testimony, p. 2; 3 Words & Phrases, p. 2594; *Wright v. Williams Estate*, 47 Vt. 222, 233.)

To render opinions of witness admissible on ground that he is an expert, he must have special skill in the subject concerning which his opinion is sought to be given. (Lawson, Expert and Opinion Evidence, p. 231, and cases.)

Opportunity for observation, without special study and attention, is insufficient to qualify one as an expert. (*Page v. Parker*, 40 N. H. 59; *Goldstein v. Black*, 50 Cal. 462.)

Opinion is entitled to no weight with a court or jury unless it comes from persons who first give satisfactory evidence that they are possessed of such experience, skill, or science in such matters as entitles their opinions to pass for scientific truth. (*Carr v. The Northern Liberties*, 35 Pa. St. 324.)

When all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received in

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evidence. (*Sappenfield v. Main St. Ry. Co.*, 91 Cal. 48, 60; *Parkin v. Grayson-Owen Co.*, 157 Cal. 41; Wigmore on Evidence, sec. 1918, p. 2552.)

All the facts within the knowledge of the witnesses, and upon which they based the opinions they were allowed to give to the jury, could not be justified as lay opinions, and were erroneously admitted. (*Railroad Co. v. Yarrowborough*, 20 S. W. 515; *Railroad Co. v. Cook*, 57 Ark. 387, 21 S. W. 1066; *Indianapolis T. & T. Co. v. Kidd*, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. n. s. 143; *American T. & T. Co. v. Green*, 73 N. E. 707; *Commonwealth v. Sturtivant*, 117 Mass. 122; *Loshbaugh v. Birdsall*, 90 Ind. 466; *Road v. Leonhardt*, 5 Atl. 346; *Mann v. State*, 3 South. 207; *Hurt v. Railroad Co.*, 7 S. W. 1; *Railroad Co. v. Fox*, 6 S. W. 569; *Stephenson v. State*, 11 N. E. 360; *Baltimore & O. R. R. Co. v. Schultz*, 1 N. E. 324; *Shaw v. Jones*, 133 Ga. 446, 66 S. E. 240; *Tenn. C. & I. Co. v. Kelly*, 50 South. 1008.)

In no case can a witness be permitted to give testimony on the subject of cause and effect; the facts must be presented to the jury, who will determine the cause of the injury. (*Chicago Co. v. Ross*, 24 Ind. App. 222, 56 N. E. 451; *Farbush v. Maryland Casualty Co.*, 91 N. W. 135; *Hillje v. Hettich*, 67 S. W. 90; *White v. Farmers M. L. I. Co.*, 97 Mo. App. 590, 71 S. W. 707; *Wright v. Commonwealth*, 72 S. W. 340; *Nichol v. Oregon S. L. R. Co.*, 27 Utah, 240, 70 Pac. 996; *Dyshane v. Benedict*, 120 U. S. 630; *Ouerson v. Grafton*, 65 N. W. 676.)

It is clearly erroneous to permit a witness to give his conclusion on the ultimate fact in a case, except it be on a matter which is the subject of expert testimony. (*In Re Coburn*, 105 Pac. 924, 932.)

Where a witness gives inferences from facts not personally observed by him, it is necessary that the data upon which he bases his inference be specified by him, and stated as assumed or hypothetical. (Greenleaf on Evidence, sec. 441k.)

A party against whom expert evidence is offered is entitled to have an explicit statement made to or by the

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expert witness of the precise facts upon which his opinion is based. (*Connelley v. Railroad Co.*, 15 N. Y. Supp. 176.)

Hypothetical presentation is necessary where the premises are not supplied by the witness himself. (Wigmore on Evidence, sec. 676; *Polk v. State*, 36 Ark. 117, p. 124; *Williams v. Brown*, 28 Ohio St. 547-51; Rogers, Expert Testimony, sec. 27, p. 64; *Muldowney v. Ill. Central*, 39 Iowa, 615; *Western Union v. Morris*, 73 Pac. 108; *Southern B. T. Co. v. Jordan*, 13 S. E. 202; *Flaherty v. Powers*, 44 N. E. 1074; *State v. Durrant*, 116 Cal. 179.)

A hypothetical question must be based on facts which there is evidence to prove, and a question which does not state the facts is improper. (*Russ v. Wabash W. R. R. Co.*, 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; *Galveston Co. v. Noelke*, 125 S. W. 969.)

The jury should know upon what basis of facts the opinion is founded. (*Wetherbee Heirs v. Wetherbee*, 38 Vt. 454; *Williams v. Brown*, 28 Ohio St. 547.)

The opinion must not be based on information gained from the statements of others obtained out of court, for such an opinion would be based upon mere hearsay. (*Polk v. State*, 36 Ark. 117; Lawson, Expert and Opinion Evidence, p. 266; *Heald v. Thing*, 45 Me. 392; *State v. Pike*, 65 Me. 111; *Flaherty v. Powers*, 167 Mass. 61.)

When plaintiff consents to an act he cannot subsequently treat it as a trespass, nor recover damages therefor. (*Cadwell v. Farrell*, 28 Ill. 438; *Ashcroft v. Cox*, 50 S. W. 986; *Law v. Nettles*, 2 Bailey L. 447; *Brown v. Armstrong*, 102 N. W. 1047; *Vanneat v. Fleming*, 44 N. W. 906; 28 Am. & Eng. Ency. Law, p. 560; *Churchill v. Bauman*, 95 Cal. 541, 104 Cal. 369.)

When a landowner permits an appropriator of water for a number of years to enter upon his land for the purpose of constructing a dam, he will be estopped by such acquiescence from thereafter treating the appropriator as a trespasser and denying his right of entry. (*Miller v. Douglas*, 60 Pac. 722.)

When a dam is acquiesced in for years, the prescriptive right to keep the water out of the stream below is as

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much entitled to protection as the right to object to it backing up above. (*Burk v. Simonson*, 104 Ind. 173; *Brown v. Armstrong*, 102 N. W. 1047.)

A parol license to construct or maintain a dam on the licensor's land is valid and cannot be revoked after licensee has made valuable improvements on the faith of the license. (*Garrett v. Bishop*, 41 Pac. 10; *Bowman v. Bowman*, 57 Pac. 547; *Lee v. McLeod*, 12 Nev. 280; *Snowden v. Wilas*, 19 Ind. 10; *Curtis v. LaGrande W. Co.*, 23 Pac. 809; *McBroom v. Thompson*, 37 Pac. 57; *Sumpter Ry. Co. v. Gardner*, 90 Pac. 499; *Flickinger v. Shaw*, 87 Cal. 126; *Grimshaw v. Belcher*, 88 Cal. 217.)

A person operating under a parol license is not liable for damages done in pursuance thereof. (*Grimshaw v. Belcher*, 88 Cal. 217; *Bottles v. Mercer*, 53 Cal. 667; 2 *Farnham on Waters*, sec. 557; *Ogle v. Diel*, 55 Ind. 130; *Cobb v. Slimmer*, 45 Mich. 178, 7 N. W. 806; *Cook v. Pridgen*, 45 Ga. 331, 12 Am. Rep. 582.)

Where a person acquires land on which a dam is constructed and upon which there is an easement in favor of other land of the grantor, a conveyance of the land does not destroy the easement. (2 *Farnham on Waters*, sec. 555a.)

Where a person has delayed to object to a trespass or nuisance, he cannot obtain equitable relief. (2 *Farnham on Waters*, sec. 582C; *Heilman v. Lebanon Co.*, 34 Atl. 647; *Clarke v. Cambridge Irr. Co.*, 64 N. W. 239; *Kinkaid v. Indianapolis Co.*, 24 N. E. 1066; *Penn Co. v. Austin*, 168 U. S. 685; *Keeling v. Pittsburg Co.*, 54 Atl. 485; *McAulay v. West Co.*, 33 Vt. 311; *Holt v. Parsons*, 45 S. E. 690; *Goodin v. Cincinnati Co.*, 18 Ohio St. 169; *Pensacola R. Co. v. Jackson*, 21 Fla. 146.)

Where a public use has attached to water, a party will not be entitled to the equitable relief of an injunction where he has stood by and permitted the public right to attach. (*Fresno Co. v. Southern Pacific*, 135 Cal. 202; *Southern Cal. Ry. Co. v. Slauson*, 138 Cal. 342; *Katz v. Walkinshaw*, 141 Cal. 116, 136; *Crescent Canal Co. v. Montgomery*, 143 Cal. 248; *Montecito Valley Co. v.*

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Santa Barbara, 144 Cal. 578; *Newport v. Temescal W. Co.*, 149 Cal. 531; *Barton v. Water Co.*, 155 Cal. 509.)

Where an easement over land is enjoyed for the period of five years openly, notoriously, uninterruptedly and continuously under a claim of right and adversely to the owner of the land, a prescriptive right to maintain it without liability for damages is acquired. (*Anthony v. Kennard Bldg. Co.*, 87 S. W. 921; *Branch v. Doane*, 17 Conn. 402, 409; *Ellington v. Bennett*, 59 Ga. 286; *Cowell v. Thayer*, 5 Metc. 253; *Virginia Hot Springs Co. v. McCrae*, 106 Va. 461; 10 Am. & Eng. Ann. Cases, 179; *Voter v. Hobbs*, 69 Me. 19; *Ray v. Fletcher*, 12 Cush. 200; *Jackson v. Harrington*, 2 Allen, 242; *Gehman v. Erdman*, 105 Pa. St. 371; *McGeorge v. Hoffman*, 135 Pa. St. 381, 19 Atl. 413; *Lucas v. Marine*, 40 Ind. 289; *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396; *Gulf Co. v. Moseley*, 161 Fed. 72, 20 L. R. A. n. s. 885; *Turner v. Overton*, 86 Ark. 406, 111 S. W. 270, 20 L. R. A. n. s. 894; *Robinson v. Southern C. R. Co.*, 129 Cal. 8; *Williams v. Southern Pac. R. R. Co.*, 150 Cal. 624.)

If the acts of plaintiff contributed to cause the injury complained of, defendant is not liable for the trespass. (*Richards v. Peter*, 38 N. W. 278; *Emery v. Railroad*, 109 N. C. 589; *Grant v. Kugler*, 81 Ga. 637, 12 Am. St. Rep. 348; *Turner v. Overton*, 86 Ark. 406, 111 S. W. 270; 20 L. R. A. n. s. 894; *Proctor v. Jennings*, 6 Nev. 83.)

The injunction should merely have regulated the height of the dam. The act prohibited must be the doing of some tangible or distinct thing or series of things, to be clearly pointed out or described. (*Lawrie v. Lawrie*, 9 Paige, 233; *St. Louis Co. v. Montana M. Co.*, 58 Fed. 129; *Regan v. Sorensen*, 100 N. W. 1095; *Governor v. Wiley*, 14 Ala. 172; *Baldwin v. Miles*, 58 Conn. 496, 20 Atl. 618; *Moat v. Holbein*, 2 Edw. Ch. N. Y. 188; *Sullivan v. Judah*, 4 Paige, 444; *Arthur v. Oakes*, 63 Fed. 310, 327.)

Where a person is engaged in a lawful business, it is not proper in any case to absolutely enjoin and abate

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the same, but it should be regulated or abated merely to the extent which is necessary to prevent damage. (*Shepard v. People*, 40 Mich. 487; *Byers v. Colonial Irr. Co.*, 134 Cal. 553; *Fresno v. Fresno Canal Co.*, 98 Cal. 179; *McMenomy v. Band*, 87 Cal. 134; *Lorenz v. Waldron*, 96 Cal. 243, 249.)

The complaint must allege that the dam is a nuisance. (*Androscoggin R. Co. v. Androscoggin R. Co.*, 49 Me. 392.) It must also allege the height of the dam claimed to be a nuisance. (*Tye v. Catching*, 78 Ky. 463; 14 Ency. Pl. & Pr., p. 1148.)

The lower court erred in setting aside the judgment entered upon the verdict. By that judgment the power of the court was exhausted, and it had no power to enter another and different judgment. (*Ophir M. Co. v. Carpenter*, 4 Nev. 534; *Castle v. Smith*, 36 Pac. 859; Rule XLV, District Court; *Bliss v. Grayson*, 24 Nev. 422.)

Before a court can abate a dam, all parties interested must be made parties to the action. (*Castle v. Madison*, 89 N. W. 156; *Eastman v. St. Anthony Falls Co.*, 12 Minn. 137; *O'Sullivan v. New York E. R. Co.*, 7 N. Y. Supp. 51; *Martin v. Blattmer*, 68 Iowa, 286; *Brady v. Weeks*, 3 Barb. 157; *Irvine v. Wood*, 51 N. Y. 224; *Taylor v. Metropolitan E. R. Co.*, 50 N. Y. Sup. Ct. 311; *Bliss v. Grayson*, 24 Nev. 422; *Robinson v. Kind*, 23 Nev. 330.)

The court should have permitted defendants to file supplemental answers setting up the alleged settlement with other parties. It is well settled that the release of one joint tort-feasor releases all of the persons liable. (24 Am. & Eng. Ency. Law, p. 306; *Chetwood v. California Nat. Bank*, 113 Cal. 414, 426.)

The memorandum of costs, not having been filed within the statutory time, should have been stricken out. (*Howard v. Richards*, 2 Nev. 128; *Sholes v. Stead*, 2 Nev. 107.)

The court erred in admitting evidence of witnesses as

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to amount of damages suffered by plaintiff, and in permitting witnesses to give their opinions as to the value of land based on productiveness. Damages cannot be proved by asking a witness how much a thing is or was damaged. (*Upcher v. Overlender*, 50 Kan. 315, 31 Pac. 1080; *Howell v. Medler*, 41 Mich. 641, 2 N. W. 911; *International R. Co. v. Fickey*, 125 S. W. 327; *Brown v. Providence Ry. Co.*, 12 R. I. 238; *Tingley v. Providence*, 8 R. I. 493; *Louisville Ry. Co. v. Sparks*, 40 N. E. 546; *Van Deusen v. Young*, 29 N. Y. 20; *Tenn. Coal Co. v. McMillan*, 49 South. 880; *Lawson*, Expert Evidence, 491; *Greenleaf*, Evidence, sec. 430; *Central of Georgia v. Barnett*, 44 South. 392.)

If the witnesses are qualified, they may give their opinions as to the value before and after the event causing the damage. (*Roberts v. N. Y. El. Ry. Co.*, 128 N. Y. 455, 28 N. E. 486; *Louisville Ry. Co. v. Sparks*, *supra*; 2 Sutherland on Damages, sec. 444.)

Evidence of value should be confined to what the property is worth in the open market, having regard to the most valuable use to which it may be put. (*Santa Ana v. Harlin*, 99 Cal. 538; *Spring Valley Co. v. Drinkhouse*, 92 Cal. 528.)

The court erred in overruling challenges to jurors. The constitution of Nevada secures to every one the right of trial by jury. The term "jury" means twelve men who are not interested in the event of the suit. (*State v. McClear*, 11 Nev. 39.) To be competent they should stand indifferent. (*Fleeson v. Savage S. M. Co.*, 3 Nev. 157, 161.) General hostility between a juror and a party, without any connection with the action to be tried, is a good cause of challenge. (*Brittain v. Allen*, 13 N. C. 120; 24 Cyc. 287; *Fleming v. State*, 11 Ind. 235; *Commonwealth v. Mosier*, 19 Atl. 943; *Mining Co. v. Showers*, 6 Nev. 291; *Lombardi v. Cal. S. R. Co.*, 124 Cal. 31; *Omaha S. R. Co. v. Craig*, 58 N. W. 209.)

Temporary interruption by plaintiff of the enjoyment of an easement by defendant, and without defendant's knowledge, is not sufficient to stop the running of the

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statute and the acquisition of a prescriptive right, or to take away a prescriptive right already acquired. (*McKenzie v. Elliott*, 134 Ill. 156, 24 N. E. 965; *Webster v. Lowell*, 142 Mass. 324; *Putnam v. Bowker*, 11 Cush. 542; *Connor v. Sullivan*, 40 Conn. 26, 16 Am. Rep. 10; *Wilkins v. Barnes*, 1 Ky. L. Rep. 328.)

Where a finding of fact is defective, and it has been excepted to in the court below, the supreme court will reverse the case for such defect. (*Whitmore v. Shiverick*, 3 Nev. 288.)

The owner of the servient estate can have a right of action only where there is an unauthorized use of the easement, or where the owner of the easement exceeds his right in the manner or to the extent of its use. (14 Cyc. 1215.)

It is a physical impossibility for a dam to cause an overflow at points up stream from four to eleven feet higher than the bank of the river at the dam, as in this case. (*Lowery v. San Joaquin Co.*, 134 Cal. 185.)

Testimony that is contrary to the known and settled laws of nature will be rejected by the court, and does not need any contradiction. (*Daggers v. Van Dyck*, 37 N. J. Eq. 130, 132; *Moore on Facts*, vol. 1, sec. 149; *Tillson v. Maine C. R. Co.*, 67 Atl. 407; *Waters-Pierce Oil Co. v. Knisel*, 96 S. W. 342.)

Plaintiffs cannot recover where their own acts and negligence contributed to the injury. (*Malmstrom v. People's Drain Ditch Co.*, 32 Nev. 246.)

Mack & Green, for Respondent:

The complaint is clearly sufficient. (*Begein v. Anderson*, 28 Ind. 79; *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516; *Dunn v. Austin*, 77 Tex. 139, 11 S. W. 1125; *Bowen v. Mauzy*, 117 Ind. 258, 19 N. E. 526; *Bordeaux v. Greene*, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600; *Ency. Pl. & Pr.* 1109, 1141; 29 Cyc. 1241-1242; *Laflin Rand Power Co.*, 131 Ill. 322, 23 N. E. 389; *Sullivan v. Waterman*, 20 R. I. 134.)

There is in this state but one form of action; technical

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distinctions between forms of action as they existed at common law have been abolished. (Comp. Laws, 3996; *Jones v. Steamboat*, 17 Cal. 487; *Rogers v. Duhart*, 97 Cal. 500; *Fraler v. Sears Union Water Co.*, 12 Cal. 555.)

The complaint in actions under our code shall contain a statement of the facts constituting the cause of action, in ordinary and concise language. (Comp. Laws, 3134; Pomeroy, Code Remedies, 4th ed. sec. 49, p. 75.)

In the selection of a jury, the determination of the trial court as to the existence or nonexistence of a general feeling against the defendants is final and conclusive. (*Bernou v. Bernou*, 114 Pac. 1000; *Galveston v. Nicholson*, 57 S. W. 693; *Barfield v. Coker*, 53 S. E. 170; *Thompson v. Autry*, 57 S. W. 47; *Mo. K. & T. Ry. Co. v. Elliott*, 102 Fed. 96, 42 C. C. A. 188; *Creditors v. Welch*, 55 Cal. 469; *People v. Findley*, 64 Pac. 472, 132 Cal. 301; *Clausen v. State*, 36 Atl. 886; *Huntley v. Territory*, 54 Pac. 314; 3 Cyc. 333; *Estes v. Richardson*, 6 Nev. 128.)

A juror is not incompetent because he has a suit pending against the same defendants growing out of an entirely different subject-matter. (*San Antonio v. Diaz*, 64 S. W. 549; *Southern Railway Co. v. Oliver*, 102 Va. 710, 47 S. E. 862.)

A juror is not incompetent because he formerly had a similar suit against the same defendants, or is defendant in a similar suit brought by the same plaintiff. (*Missouri Ry. Co. v. Elliott*, 51 S. W. 1067; *Austin v. Cox*, 60 Ga. 520.)

Even a relationship to a witness does not disqualify a juror, much less a mere acquaintance with the witness. (*Faith v. City of Atlanta*, 78 Ga. 779, 4 Atl. 3; *Stewart v. Ry. Co.*, 136 Ky. 717, 125 S. W. 154.)

A mere hypothetical opinion based upon hearsay information and not raised by witnesses does not disqualify a talesman. (*People v. Murphy*, 45 Cal. 137; *People v. Williams*, 17 Cal. 142; *State v. Williams*, 28 Nev. 395.)

Where the dam of a lower proprietor causes the deposit of sand, sediment, and debris in a stream, resulting in the overflow of the lands of an upper proprietor, the former is liable for any resulting damage. (*Hagge v. Kansas City*

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S. R. Co., 104 Fed. 391; *Turner v. Lacy*, 37 Or. 158, 67 Pac. 342; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 3 S. E. 885; *Schuylkill N. Co. v. McDonough*, 33 Pac. 73; *Blizzard v. Danville*, 34 Atl. 846; *Ames v. Dorset M. Co.*, 64 Vt. 10, 23 Atl. 857; *Talbot v. Whipple*, 7 Gray, 122; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Cowels v. Kidder*, 24 N. H. 364, 54 Am. Dec. 287; *Cline v. Baker*, 118 N. C. 780, 24 S. E. 516; *Hardin v. Ledbetter*, 103 N. C. 90, 9 S. E. 641; *Farnham on Waters*, vol. 2, sec. 567, p. 1820; sec. 570, pp. 1832, 1833.)

Both at common law and in the United States a natural stream cannot be disturbed by a lower proprietor to the detriment of those above him. (*Kroeger v. Twin Buttes*, 114 Pac. 553; *Herriman v. Finan*, 133 N. Y. Supp. 1034; *Colket v. Verner*, 84 Atl. 775, 236 Pa. 285.)

The construction of a solid dam in the river evinced a wanton disregard of the upper proprietor's rights, and imposed liability upon the defendants. (*Jones v. Fisher*, 17 Can. S. C. 513; *Ramsale v. Foote*, 55 Wis. 557, 13 N. W. 557; *Hass v. Choussard*, 17 Tex. 588; *Masonic T. Assn. v. Banks*, 94 Va. 695, 27 S. E. 490; *Wilhelm v. Burleyson*, 106 N. C. 381, 11 S. E. 590; *Moffett v. Brewer*, 1 Greene, 349; *Delaney v. Boston*, 2 Harr. 489; *Morris v. Commander*, 25 N. C. 510; *Miller v. Slowman*, 26 Ind. 143; *Coloney v. Farrow*, 91 Hun, 82, 36 N. Y. S. 164; *Winchell v. Clark*, 68 Mich. 64, 35 N. W. 907; *Boatner v. Henderson*, 5 Mart. 186; *Hill v. Ward*, 7 Ill. 285; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Little v. Slamtack*, 63 N. C. 285; *Thompson v. Crocker*, 9 Pick. 59; *Sims v. Smith*, 7 Cal. 149, 68 Am. Dec. 233; note to 59 L. R. A. 817 and 28 L. R. A. n. s. 156.)

Even if the erection and maintenance of the dam in question was a lawful act or business, it constitutes no excuse for a nuisance that causes injury to another. (21 Am. & Eng. Ency. Law, 2d ed. 689; *Scott v. Day*, 3 Md. 431; *Railroad v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Friedman v. Columbia M. Works*, 91 N. Y. S. 129; *Barrick v. Schifferdecker*, 1 N. Y. S. 21; *Catlin v. Patterson*,

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10 N. Y. St. 724; *Mulligan v. Elias*, 12 Ab. Pr. n. s. 259; *Barkau v. Knecht*, 9 Ohio Dec. 66; *Rodenhausen v. Craven*, 141 Pa. St. 546, 23 Atl. 774; *Ducktown S. Co. v. Barnes*, 60 S. W. 593; *Nevill v. Mitchell*, 66 S. W. 579; *People v. Burtleson*, 47 Pac. 817; *Jung B. Co. v. Commonwealth*, 96 S. W. 595; *Attorney-General v. Stewart*, 20 N. J. Eq. 415; *Cleveland v. Citizen's G. Co.*, 20 N. J. Eq. 201; *Riley v. Curley*, 75 N. J. Eq. 57, 71 Atl. 700; *Lumber Co. v. Sharp*, 123 S. W. 370.)

The creation and maintenance of a nuisance is an actionable wrong, and therefore unlawful. (Comp. Laws, 3346; Stats. 1901, 39.)

One who wrongfully causes water to flow upon another's land, which would not flow there naturally, creates a nuisance. (29 Cyc. 1178; *Oil Co. v. Jackson*, 91 N. E. 825; *Andette v. O'Cain*, 39 Kan. 103.)

Whether the maintenance of the dam was a nuisance was a question of fact for the jury and the trial court, and their determination is conclusive. (21 Am. & Eng. Ency. Law, 619.)

No notice that the dam constituted a nuisance was necessary to charge defendants with liability. (29 Cyc. 1233.)

They had actual knowledge of the existence of the dam and of the insufficiency of the river to carry the waters, which rendered notice unnecessary. (Farnham on Waters, sec. 566.)

A person obstructing a watercourse is liable for damage caused by extraordinary floods, where such or similar floods have occurred in the past, although at irregular and uncertain periods. (*Ohio Ry. Co. v. Ramey*, 139 Ill. 9; *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Atchison Ry. Co. v. Herman*, 74 Kan. 77, 85 Pac. 817; *Gray v. Harris*, 107 Mass. 492; *New York v. Bailey*, 2 Denio, 433; *Graham v. Chicago I. & L. Co.*, 39 Ind. App. 294, 77 N. E. 57, 1055; *Howard v. Buffalo*, 122 N. Y. Supp. 1095.)

Liability for a nuisance exists regardless of negligence of the parties creating it. (29 Cyc. 1155; *Athens*

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M. Co. v. Rucker, 80 Ga. 291, 4 S. E. 885; *Curtiss v. Eastern R. R. Co.*, 98 Mass. 428; *Wilson v. New Bedford*, 108 Mass. 261; *Eason v. Wattier*, 25 Or. 7, 34 Pac. 756; *Texas Ry. Co. v. O'Mahoney*, 60 S. W. 902; *Pikley v. Clark*, 35 N. Y. 520; *Cahill v. Eastman*, 18 Minn. 324; *Kanakee W. Co. v. Reeves*, 45 Ill. App. 285; *Fuller v. Chicopee M. Co.*, 16 Gray, 46; *Schoot v. Longwell*, 138 Mich. 12.)

The question of negligence is not involved in an action for the erection and maintenance of a nuisance. (29 Cyc. 1155; *Risher v. Coal Co.*, 124 N. W. 764; *Marble Co. v. Gas Co.*, 128 Mo. App. 96, 106 S. W. 94; *Cahill v. Eastman*, 10 Am. Rep. 184.)

Direct injury and liability exist, regardless of negligence. (*Wine v. N. P. Ry. Co.*, 136 Pac. 387.)

An action for obstructing the flow of water by raising the height of a dam on the stream below is not a suit for negligence, but for wrongful acts, and the doctrine of contributory negligence does not apply. (*Williamson v. Yingling*, 80 Ind. 379; *Athens M. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885.)

It was the duty of defendants to maintain the dam at such a height only as would not cause the river to overflow, even though the dam might have been originally constructed at a greater height. (*Missouri, K. & T. Ry. Co. v. Johnson*, 126 Pac. 567; *Saenger v. Harris*, 120 Pac. 1117; *Patajanueni v. Washington Power Co.*, 124 Pac. 783.)

Defendants acquired no prescriptive right to overflow plaintiff's lands by the erection of a dam that did not overflow them. The prescriptive period commenced to run only when the lands were first overflowed. The overflow constituted the wrongful trespass, and not the erection of the dam. (*Iowa Power Co. v. Hoover*, 147 N. W. 858; *Shearer v. Hutterische*, 134 S. W. 63; *Boyn-ton v. Longley*, 19 Nev. 69; *Ellington v. Bennett*, 59 Ga. 286; *Postlethwaite v. Payne*, 8 Ind. 104; *Whitehair v. Brown*, 80 Kan. 297; *Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243; *Miller v. Belleville*

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Bank, 148 Mich. 339, 111 N. W. 1062; *Griffin v. Bartlett*, 55 N. H. 119; *Morris v. Commander*, 25 N. C. 510; *Lynch v. Trozell*, 207 Pa. St. 162, 56 Atl. 413; *Sabin v. Johnson*, 35 Wis. 185; *King v. U. S.*, 59 Fed. 9.)

By claiming a prescriptive right, appellants adopt as their own all of the acts of their codefendants and predecessors. (*Wills v. Babb*, 222 Ill. 95, 78 N. E. 42.)

A party claiming a prescriptive right who enlarges the use cannot at the end of the period of limitations claim the use as enlarged and extended. (*Boynnton v. Longley*, 19 Nev. 76.)

Plaintiff was not required to commence action to abate the nuisance or to recover damages until the dam became a nuisance and injury ensued. (*Gorman v. Trice*, 79 Ga. 731, 5 S. E. 129; *Sumner v. Tilston*, 7 Pick. 198; *Ohio & M. R. Co. v. Nuerzel*, 43 Ill. App. 108; *Ward v. Ward*, 22 N. J. L. 699; *Russell v. Turner*, 59 Me. 256; *Gleason v. Tuttle*, 46 Me. 288; *Economy L. & P. Co. v. Cutting*, 49 Ill. App. 422; *Wilson v. Wilson*, 2 Vt. 68.)

Appellants were liable for damage and subject to injunction, even though the dam was constructed and maintained under state or federal authority. (*Sheffield Car. Co. v. Constantine H. Co.*, 137 N. W. 305; *Van Wie v. Southern W. P. Co.*, 134 N. W. 828.)

There was no error in admitting the testimony of witnesses offered to connect facts with cause and effect. They were competent as experts, and the subject was one concerning which expert testimony might be given. (*Congress Spring Co. v. Edgar*, 99 U. S. 645; *McLeod v. Lee*, 17 Nev. 122; *Grigsby v. Clear Lake W. Co.*, 40 Cal. 404; *Bell v. Hardesty*, 16 Pac. 80; *Ohio & M. Ry. Co. v. Webb*, 32 N. E. 527; *St. L. Ry. v. Lyman*, 22 S. W. 170; 2 Ency. of Ev., p. 952.)

The court, in considering the sufficiency of the evidence to support findings by the court or verdict by the jury, will take the part of the evidence which most strongly bears for the successful party. (*Little v. Gorman*, 114 Pac. 321; *Hills v. Edmund Peycke*, 110 Pac.

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1088; 3 Cent. Dig., secs. 3762-3897; 2 Dec. Dig., secs. 931-989.)

Actual observation of witnesses having practical experience has often been held entitled to greater weight than opinions based upon levels and measurements, and deposit of sand and dead water has frequently been held to interrupt the current of a stream far above the theoretical level. (*Hand v. Catawba P. Co.*, 144 Mich. 370, 115 Am. St. Rep. 453; *Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243; *Mill Co. v. Green*, 58 Iowa, 86, 12 N. W. 128; *Brown v. Bush*, 45 Pa. St. 61; *Merriman's Hydraulics*, 1906, p. 325.)

Plaintiff had no cause for action for the abatement of the dam until the dam became a nuisance. (*Eastman v. Power Co.*, 12 Minn. 137; *Prentiss v. Wood*, 132 Mass. 486; *King v. U. S.*, 59 Fed. 9; *Culver v. Chicago*, 38 Mo. App. 365; *Thornton v. Turner*, 11 Minn. 336; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Chicago v. Andreesen*, 62 Neb. 456, 87 N. W. 167; *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Delaware Co. v. Wright*, 21 N. J. L. 469.)

An easement to overflow the lands of an upper proprietor may be acquired by prescription; but appellants never acquired an easement to overflow the lands of plaintiff, either by grant or prescription, and the jury and the trial court so found. (2 Farnham on Waters, sec. 551.)

The instructions correctly stated the law as applied to the facts of the case. The statute did not begin to run against plaintiff's cause of action until his lands were overflowed as a result of the dam. (*Boynnton v. Longley*, 19 Nev. 76; *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396; *Authurs v. Bryant*, 22 Nev. 242; *L. & W. Co. v. Hancock*, 85 Cal. 226; *Cave v. Crafts*, 53 Cal. 135; *Smith v. Russ*, 84 Am. Dec. 739; *Prentiss v. Wood*, 132 Mass. 486; *Culver v. Chicago Co.*, 38 Mo. App. 365; *Thornton v. Turner*, 11 Minn. 237; *Hampstead v. Car-gill*, 48 Mo. 558; *Chicago v. Andree*, 87 Mo. 167; *Union*

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Trust Co. v. Cuppy, 26 Kan. 754; *Roundtree v. Brantley*, 73 Am. Dec. 470; *King v. U. S.*, 59 Fed. 9; *Farnham on Waters*, sec. 586; *Shumway v. Simons*, 1 Vt. 53; *Gilford v. W. Lake Co.*, 52 N. H. 262; *Ohio & M. R. Co. v. Wachter*, 23 Ill. App. 415; *Jones v. U. S.*, 48 Wis. 385, 4 N. W. 519; *Turner v. Hart*, 15 Am. St. Rep. 243; *Brown v. Bush*, 45 Pa. St. 61.)

Respondent was entitled to the injunction granted by the trial court. (*Harriman v. Finen*, 133 N. Y. Supp. 1034; *Sheffield Car Co. v. Constantine H. Co.*, 137 N. W. 305; *Taylor v. Rudy*, 137 S. W. 574; *Bramley v. Jordon*, 133 N. W. 706; *Shearer v. Hutterische Geneinde*, 134 N. W. 63.)

An injunction is sufficiently definite if it is possible for those enjoined to ascertain the acts enjoined. (*Sullivan v. Judah*, 4 Paige Ch. 444; *Ballantine v. Webb*, 47 N. W. 485; *Robinson v. Clapp*, 65 Conn. 365, 29 L. R. A. 582; 22 Cyc. 958; *Oehler v. Levy*, 234 Ill. 595, 85 N. E. 271; *Sprague v. Kanes F. E. Co.*, 144 N. Y. Supp. 152; *Stiles v. Hooker*, 7 Cow. 266; *Marchy v. Shults*, 29 N. Y. 346.)

There could be no appeal from the judgment, because it was not taken within one year. (Comp. Laws, 3425; *Solomon v. Fuller*, 13 Nev. 276.)

Time cannot be extended by order of court or stipulation of parties; and after expiration of the time limited by statute, the court loses jurisdiction of the cause. (*Brown v. Green*, 65 Cal. 221; *Williams v. Long*, 130 Cal. 58; *McDonald v. Lee*, 132 Cal. 252; *Spelling*, New Trials, sec. 543; *Hayne*, New Trials and Appeals, sec. 204; 2 Cyc. 799-800.)

A party cannot appeal from an order or decision when the order or decision is correct, so far as his interests are concerned. (*Daniel v. Daniel*, 39 Ark. 266; *Porter v. Singleton*, 28 Ark. 483; *Scotland v. East Branch M. Co.*, 56 Cal. 625; *Hudson v. Hudson*, 84 Ga. 611, 10 S. E. 1098; *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899; *Simms v. Lloyd*, 58 Md. 477; *Hoops v. McNichols*, 38 Neb. 76, 57 N. W. 721; *Hyatt v. Dusenbury*, 106 N. Y. 663, 12 N. E. 711; *Bullard v. Kenyon*, 78 Hun. 26, 29

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The findings are within the issues of the case, and no exception to the want of findings was filed in court within five days after the making of the finding or decision. (Comp. Laws, 3858.)

The appellate court will not disturb a verdict or judgment where there is a substantial conflict of the evidence, or where it is supported by material evidence. (*Tonopah L. Co. v. Riley*, 30 Nev. 322; *Wiggins v. Preedere*, 105 Pac. 1024; *Murray v. Osborne*, 111 Pac. 31; *Rawhide B. F. M. Co. v. Rawhide C. M. Co.*, 111 Pac. 30; Cent. Dig., Appeal and Error, secs. 3983-3989; 2 Dec. Dig., sec. 1011.)

That the defendants sued were not the only guilty parties, was no reason for the refusal to enjoin those before the court. (*Sammons v. Gloversville*, 70 N. Y. S. 284; *Parker v. Woolen Co.*, 195 Mass. 591, 81 N. E. 468, 10 L. R. A. n. s. 584; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 419; *People v. Gold Run D. Co.*, 66 Cal. 138, 4 Pac. 1152; *Oulihan v. Butler*, 189 Mass. 288, 75 N. E. 726.)

A judgment rendered against several codefendants, though invalid for want of jurisdiction over them, is not void and cannot be impeached collaterally by defendants as to whom the court had jurisdiction. (*Jasper v. Mickey*, 4 S. W. 424; *Holton v. Lowner*, 81 Mo. 360; *Bailey v. McGinnis*, 57 Mo. 362.)

Samuel W. Belford, as Amicus Curiae:

Where public improvements or works have been authorized by law and do not encroach directly upon private property, they cannot be treated and proceeded against as nuisances, nor will their existence be a good ground for recovery of damages as for a nuisance, except upon allegation and proof of negligence in their construction or operation. Where the alleged nuisance is the result of the development by the owner of his own land in the

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production and utilization of its natural resources, the charge can be sustained only when it is shown that the owner has failed to exercise due care to so conduct his business as to avoid the injurious results complained of. (*Brown v. Humphrey*, 109 N. W. 714-717; *Hauck v. Pipe Line Co.*, 26 Atl. 644; *Vogt v. City*, 110 N. W. 603.)

The general rule governing the issuance of injunctions is applicable to private nuisances, and they will not be enjoined where there is a remedy of compensation for injuries. (*Randall v. Freed*, 97 Pac. 669; *Wood on Nuisances*, 3d ed. p. 1150; *Zimmerman v. Gretzmacher*, 98 Pac. 875.)

What the legislature declares to be lawful cannot be a nuisance unless through negligence and want of care. (*Randall v. Jacksonville St. Ry. Co.*, 19 Fed. 409; *State v. L. & N. Ry. Co.*, 86 Ind. 114; *Chope v. Detroit Co.*, 37 Mich. 195; *Gray v. Patterson*, 60 N. J. Eq. 385; *Crofford v. Alabama Ry. Co.*, 48 South. 366; *Southern Ry. Co. v. Albes*, 45 South. 234-238; *Simonds v. Telephone Co.*, 72 Atl. 175; *Farrell v. Old Town*, 69 Me. 72; *Winship v. Enfeld*, 42 N. H. 197; *Thompson v. Dodge*, 60 N. W. 545; *Steiner v. Phila. Tract Co.*, 19 Atl. 491; *A. T. & S. F. R. R. Co. v. Armstrong*, 80 Pac. 978; *Meyer v. V. & T. Ry. Co.*, 16 Nev. 341; *Longabaugh v. V. & T. Ry. Co.*, 9 Nev. 271; *Walsh v. V. & T. Ry. Co.*, 8 Nev. 110; *Trans. Co. v. Chicago*, 99 U. S. 635.)

By the Court, COLEMAN, J.:

This is a suit instituted by respondent against appellants to recover judgment for alleged damages in the sum of \$48,450, and to obtain a decree of the court abating a certain dam in Walker River, known as the Spragg, Alcorn & Bewley dam, which, it is claimed, is responsible for the overflow of the Walker River, and the consequent damages. From a judgment in favor of plaintiff in the sum of \$25,475 damages and a decree directing defendants to reduce the height of the dam, and from an order denying the motion for a new trial, this appeal is taken.

The plaintiff was, at the time the suit was instituted, and for a number of years theretofore, the owner of a ranch of 940 acres, through which the Walker River flows for a distance of over two and a half miles. Defendants own ranches on the river below the ranch of plaintiff. Between the years 1871 and 1873, one Mason, the then owner of the land upon which the dam is situated, and which is now owned by the plaintiff, erected, in conjunction with others, at and upon the extreme lower end of what is now plaintiff's ranch, the Spragg, Alcorn & Bewley dam, for the purpose of diverting the water from the river into a ditch for irrigation purposes. Almost a mile above the Spragg, Alcorn & Bewley dam there was erected in 1873 a dam known as the Merritt dam, to be used for the same purpose, which, though washed out in 1883, was rebuilt. Some distance above the Merritt dam, possibly from one-third to one-half mile, is the Perazzo ditch, which takes water from the river, and which, with the consent of plaintiff, was constructed in 1903. There are several other ditches, either on or just above the McLeod ranch, which take water from the river for irrigation. It also appears that the river, as it flowed through the ranch of plaintiff, was very crooked, and the plaintiff made several cuts for the purpose of straightening it. These cuts were through sandy soil, and, as a rule, were only about two feet wide; it being left to the river to wash out so much more of the soil as was necessary to carry the waters of the stream. The upper point of overflow, which is alleged to have caused considerable damage, was over two miles up the river from the Spragg, Alcorn & Bewley dam. The fall in the river is about 1 foot to the 1,000, which would make the bed of the river at the Spragg, Alcorn & Bewley dam about ten and one-half feet lower than at the upper point of overflow. Overflows from the river and upon plaintiff's land took place in the years 1862, 1868, 1876, 1881, 1884, 1886, 1890, 1902, 1903, 1904, 1905, 1906, and 1907. This suit is to recover for the damage alleged to have been caused by

the overflows in the years 1904, 1905, 1906, and 1907. It is urged by the appellants that the case should be reversed for the reason that it appears from the evidence that it was physically impossible for the Spragg, Alcorn & Bewley dam to have so affected the flow of the stream as to have caused the deposit of the silt, which was carried in suspension in the stream, as far up the river as the points of overflow. It is their theory that the dam would not affect the current of the river for a much greater distance than at the point where a horizontal line drawn from the crest of the water at the dam intersects the bed of the river. In other words, it is contended that, since the river has a fall of 1 foot to the 1,000, a dam one foot high would affect the flow of the river only for a little more than 1,000 feet up the river from the dam, a dam two feet high would affect the flow only a little over 2,000 feet up the river from the dam, and so on; and since the Spragg, Alcorn & Bewley dam, prior to 1903, was never more than four feet high, and at no subsequent time over five feet high, the flow of the stream could by no possibility be influenced above the Merritt dam. This theory not only appeals to the mind of the layman, but the appellants called several engineers, all of whom testified that the deposit of silt could not be affected to any appreciable distance above the point of intersection mentioned.

Prof. Thurtell, formerly of the University of Nevada, and some time state engineer, and now chairman of the Fourth Section Board under the Interstate Commerce Commission, after making a survey of the stream, testified that the deposit of silt would not be affected more than 200 feet above said point of intersection.

Mr. Hammond, the expert called in behalf of plaintiff, testified:

“Q. Now, then, assuming that the Spragg, Alcorn & Bewley dam is six feet in height, I am speaking now of the original bed of the river, where would that line, if drawn up the river, meet the original bed of the river?
A. Six feet?”

"Q. Six feet in height? A. Six feet in height. Six thousand feet. * * *

"Q. Assuming that the dam was seven feet in height, how high up would it strike the bed of the river? A. Seven thousand feet, theoretically.

"Q. If the dam was seven and a half feet in height, how high up would it strike the bed of the river? A. Seven thousand five hundred feet."

In opposition to the testimony of defendant's engineers, and the testimony of Mr. Hammond, just quoted, is the testimony of several ranchers who had lived in the community for a number of years. Witness Rallins testified, over the objection and exception of defendants:

"Q. Do you know how the water of the river came to overflow on those places along the ranch as you describe it? A. I do.

"Q. What was the cause of the overflow on the McLeod place? A. By building up the dam, causing sand and sediment in the river, and causing the river to overflow its banks.

"Q. What dam do you refer to? A. The Spragg, Alcorn & Bewley dam."

The witness Martin testified, over the objection and exception of defendants:

"Q. What was the cause of the damage to the land? A. Well, the cause was, the river bed was full of sand, and the water had to flow out some place.

"Q. Do you know the cause of the filling of the river with sand? A. Yes.

"Q. Now, what was the cause? A. Well, from my experience on the river, I know that dams cause the sand to form in the river.

"Q. Now, as to the place, the particular place known as the McLeod place, what particular dam do you have reference to as having caused the deposit of sand? A. I have reference to the Spragg, Alcorn & Bewley dam."

The witness Nichol testified, over the objection and exception of defendants:

"Q. Do you know what caused the deposit of sand in

the channel of the river above the Spragg, Alcorn & Bewley dam? A. Yes.

“Q. What was the cause of the deposit of sand in the channel of the river above the dam, and up as far as the ford at the McLeod house? A. The dam, the Spragg, Alcorn & Bewley dam.

“Q. Do you know what caused the overflow. A. The river not having the capacity to carry the water.

“Q. Why didn't it have the capacity? A. The river filled up with sand.

Plaintiff testified, over objection and exception:

“A. Yes, I testified very fully in regard to the cause, I think.

“Q. You may state what caused that, if you know of your own knowledge. A. I could give you here a statement as my positive opinion.

“Q. Well, I don't want any opinion, I want to know what you know. A. Well, I had better not say, I might not know, but I do know that it was caused by this dam in the river, I am positive; I know that it was.”

Other witnesses testified to the same effect. It is this line of testimony which counsel for respondent, notwithstanding the admitted facts that the water which overflowed just above the Perazzo ditch went back into the main stream below the Merritt dam and above the Spragg, Alcorn & Bewley dam, and that there was no overflow between the Merritt and the Spragg, Alcorn & Bewley dams, think should be sufficient to establish their case by a preponderance of the evidence.

1. Counsel for plaintiff call our attention to the case of *Hand v. Catawba Power Co.*, 90 S. C. 267, 73 S. E. 187, in support of their contention that testimony of the ranchers in the neighborhood of the McLeod ranch should outweigh the testimony of the experts called by defendants. While it is undoubtedly the general rule that witnesses must testify as to matters of fact, and leave the conclusion to be drawn by the jury, there are certain exceptions to this rule; and, when it is impossible for the witness to detail all of the pertinent facts

in such a manner as to enable the jury to form a conclusion, the witness may give his opinion. The facts in that case no doubt justified the ruling of the court.

"It is not proper to allow one who is not an expert to express an opinion in any case upon a question with relation to which all the facts may be placed before the jury; and to receive as evidence the opinion of a lay witness upon the precise issue submitted for trial in such case would permit the witness to usurp the province of the court or jury trying the cause." (*Amer. T. & T. Co. v. Green*, 164 Ind. 349, 73 N. E. 707.)

See, also, *Loshbaugh v. Birdsell*, 90 Ind. 466; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Balto. etc. Road v. Leonhardt*, 66 Md. 70, 5 Atl. 346; *Mann v. State*, 23 Fla. 610, 3 South. 207; *Stephenson v. State*, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216; *Shaw v. Jones*, 133 Ga. 446, 66 S. E. 240.

2. The question, then, is: Were the facts and circumstances which entered into the forming of an opinion by the witnesses themselves as to what caused the overflows complained of capable of being detailed to the jury? If they were, the opinion of the various non-expert witnesses should have been excluded; if they were not, their admission and testimony by the court was not error. It appears from the evidence in this case, which took about five weeks to hear, that various witnesses detailed what transpired along the river as it flows through the property owned by the parties, from a very early day in the history of the valley. The various dams, ditches, cuts, overflows, etc., were minutely detailed to the jury. Besides, the jury were taken to, and personally viewed, the premises in question. Under the condition of the record, it appears to us that the objections to the opinions of the nonexpert witnesses should have been sustained.

In this connection, there is another fact worthy of consideration, and that is the relationship of the Merritt dam to the Spragg, Alcorn & Bewley dam, so far as the latter affected the deposit of silt above the Merritt

dam. It must be borne in mind that the Merritt dam is nearly a mile further up the river from the Spragg, Alcorn & Bewley dam, and that it was put in for the purpose of diverting a portion of the water of the river into an irrigation ditch. The Merritt dam was partly washed out in 1883, but was rebuilt, and, so far as appears, remained in the river and was eventually covered with sand; the last seen of it, according to the testimony of plaintiff, being in 1904, while Waldo, one of his witnesses, testified that he saw it in 1906.

J. C. Mills, a witness for plaintiff, and an owner in the Merritt ditch since 1886, testified that when he first saw the ditch the bed of the river was from a foot to a foot and a half below the level of the ditch, and that it was for this reason the dam was put in; that in 1886 the dam was on a level with the floor of the gates; that about that time the dam was practically covered with sand and has remained covered ever since; that the sand kept increasing after 1886 until in 1900, when he assisted in putting in another headgate in the Merritt ditch; that in 1900 the bed of the river was three feet and one inch higher than it was in 1886; that in the fall of 1905 the river was filled with sand at the Merritt dam level across and only eighteen inches or less from the top of the banks; and that at the time of the trial there were three feet of sand on top of the rocks of the Merritt dam.

G. T. Feiganspan, a witness for the plaintiff, and an owner in the Merritt ditch, and its manager since 1880, testified that he first saw the Spragg, Alcorn & Bewley dam in 1890; that five or six years after 1883, he noticed that the Merritt dam was no longer in sight; that in his opinion the Spragg dam backed sand over the Merritt dam in 1885. Asked why he would say the Spragg dam covered the Merritt dam with sand in 1885, when he did not see the former dam until five years later, he replied, "That is the only thing I can lay it to."

Plaintiff testified that the Merritt dam raised the water two feet.

Now, is it not conclusive that the Merritt dam, under respondent's theory of the case contributed to the filling of the river? The rebuilding of the Merritt dam in 1883 is a conclusive argument to the effect that at that time at least the backwater from the Spragg, Alcorn & Bewley dam did not reach up to that point, for, if it had, the effect of the backwater would have accomplished the very purpose for which the dam was rebuilt. Furthermore, if the Merritt dam was two feet high, and the fall of the river being 1 foot to the 1,000, and if the Spragg, Alcorn & Bewley dam was 4,000 feet further down the river from the Merritt dam, was it not a physical impossibility for the backwater to have reached the top of the Merritt dam unless the Spragg, Alcorn & Bewley dam was six feet high? Upon the same theory, if the Merritt dam was only one foot high, and the Spragg, Alcorn & Bewley dam 4,000 feet further downstream, it must have been five feet high to have caused the backwater from it to reach the top of the Merritt dam; and if the Merritt dam was six inches high, and the Spragg, Alcorn & Bewley dam 4,000 feet further down stream, it must have been four and a half feet high before the backwater from it could have become as high as the Merritt dam. If this is true, how could it be possible for the backwater from the Spragg, Alcorn & Bewley dam to affect the stream above the Merritt dam? In fact, counsel for respondent say in their brief:

"It is true that McCray, Thurtell, and Hammond testified a dam could not cause the deposit of sand above the point where the dam affected the current of the river. That is the statement of a proposition known to every one, which statement is a mere hypocrisy intended and calculated to mislead the jury and the court. The issue was as to how far the dam did affect the current of the river."

Counsel for respondent take the position that the contention of appellants is correct to the extent that backwater will not be affected much further up the stream than at the point where a horizontal line drawn

from the crest of the water as it passes over a dam intersects the bed of the river, but contend that a different rule applies so far as the influence upon the deposit of sand is concerned. If we concede this contention to be correct as to the influence on the deposit of sand, we are yet unable to see how the backwater from a dam can possibly affect the deposit of sand above a dam which is further up the stream, when the backwater from the lower dam does not reach the top of the upper dam. If we take the correct view of the situation, it necessarily follows that the opinions of the nonexpert witnesses called by plaintiff, even if admissible, are of little or no value whatever. It is said:

“Courts are not so deaf to the voice of nature, or so blind to the laws of physics, that every utterance of a witness in derogation of those laws will be treated as testimony of probative value simply because of its utterance.” (1 Moore on Facts, sec. 160.)

Mr. Justice Marshall, in speaking for the Supreme Court of Wisconsin, in *Groth v. Thomann*, 110 Wis. at page 181, used the following language:

“When physical situations or matters of common knowledge point so certainly to the truth as to leave no room for a contrary determination, based on reason and common sense, such physical situation and reasonable probabilities are not affected by sworn testimony which, in mere words, conflicts therewith. The fact established by the situation itself and matters of common knowledge, so clearly that no one can reasonably dispute it notwithstanding evidence to the contrary, must stand uncontroverted and uncontrovertible, condemning as false such contrary evidence, either upon the ground of mistake or something worse.”

Just here it may not be out of place to say that, while Prof. Merriman, in his *Treatise on Hydraulics* (9th Ed.), at page 353, takes the position that while many attempts have been made to determine the precise distance that a dam will cause backwater, none can be said to have been successful. From the formulas which he gives we

understand him to mean that because of the varying dimensions, fall, etc., of a stream, it is difficult to tell the exact point at which the backwater from a dam will affect the flow of a stream. We think there can be no doubt about that proposition; but the matter of a few hundred feet, more or less, makes no difference in this case. The question of approximating the distance with some considerable degree of exactness arises in cases where a dam causing backwater may affect a mill wheel located on the stream above the dam. It is clear, however from Mr. Merriman's work, that the point of backwater never varies greatly from the point where a horizontal line drawn from the crest of the dam will intersect the surface of the stream. But regardless of Prof. Merriman's view, it appears from the statement in the brief of counsel for respondent, and from the evidence of his expert, Mr. Hammond, that there is no substantial difference of opinion between the parties to the suit as to the distance at which the flow of water will be affected by a dam.

Taking respondent's view of the case, however, it is impossible to comprehend that the Merritt dam was not having the same effect in causing deposits of sand in the bed of the river above that dam that the Spragg dam was causing above it. Under counsel for respondent's theory, the Merritt dam must have been causing a deposit of sand in the bed of the river above that dam for about fourteen years before the Spragg dam could possibly have had any effect upon the river above the Merritt ditch. According to respondent's theory, a deposit of sand is caused in the stream at the upper point of backwater, thus raising the bed of the river—in effect causing another damming at that point—which in turn checks the current still further up the stream, and this process continues indefinitely up the stream. If this theory is correct, a dam in a river carrying silt, when it once starts a deposit of silt, must operate as a continuing cause of deposit up the stream, except as such deposit may be overcome by scouring during certain

stages of the river volume. Hence it follows that it is impossible, under respondent's theory, to say that the Merritt dam was not a contributing cause to respondent's injury. A fact that should be borne in mind in considering respondent's theory is that the height of a dam is immaterial so long as it is high enough to cause backwater.

Assuming the theory of respondent to be correct, and assuming that the Spragg dam did cause the river between it and the Merritt dam to fill with sand so that eventually the sand reached to the top of the Merritt dam, it then is a physical fact that the two dams would thereafter cooperate in causing a deposit of sand in the river above the Merritt dam.

It is to be regretted that the laws of hydraulics controlling the deposit of material carried in suspension in flowing streams have not been demonstrated so far as to establish as a known law whether backwater from a dam will or will not cause a deposit above the point of backwater.

3. This is the first case where a dam used to divert water for purposes of irrigation has been charged with responsibility for an overflow alleged to have been occasioned by filling the bed of the stream with a deposit of sand far above the point reached by backwater caused by the dam. If scientists had determined these laws so that they could be applied to the facts of this case, courts would be bound to apply them. In so far as experts upon hydraulics have expressed their opinion, both in this case and in the *Hand v. Catawba Power Co.* case, cited *supra*, such opinion has been that the dam would not affect the deposit of sand and silt much above the point of backwater. Where, because they are unknown, it is impossible to apply fixed natural laws to a solution of the problem, courts must resort to the best means available of determining, if possible, the truth of the case. Hence expert testimony may be considered, as well as facts established by the testimony of other witnesses; but, as before pointed out, nonexpert witnesses may not be

permitted to invade the province of the jury and testify directly to the ultimate fact in the case.

In considering the question of what caused the overflow for which recovery is sought, and assuming the correctness of respondent's theory, there are, in our opinion, other elements to be reckoned with besides the Spragg, Alcorn & Bewley dam. We believe no one will deny that the rapidity with which water flows has a good deal to do with the percentage of deposit of the silt which is carried in the water. If sufficient sand is deposited into running water to raise the percentage of sand from 5 per cent to 50 per cent, it can readily be seen that the speed of the flow will be greatly decreased. The plaintiff made several cuts through his ranch for the purpose of straightening the river. The method of making a majority of these cuts was to dig a ditch about two or three feet wide and turn the water of the river into the ditch that it might, in the ordinary process of erosion, wash out a channel wide enough to carry all the waters of the stream. One of the cuts was made by taking off the surface to a depth of two feet and thirty feet wide. The contents of all of the cuts, which washed down the river, were over 30,000 cubic yards. The last-named cut was made in April, 1907, and the water turned in before the overflow of that year, though it is not known to exactly what depth the cut was washed out at the time of the overflow. The cutting away of the soil by the water flowing through these new cuts necessarily had the effect of greatly increasing the sand which was carried in the water, and, consequently, in decreasing the rapidity of the flow of the stream, naturally increasing the quantity of the deposit of silt in the river below the cut. Believing, as we do, that the cuts made by the plaintiff contributed toward the filling up of the river, we are unable to see why defendant should be held liable for the total damage done to plaintiff's ranch caused by the overflows, if to any extent whatever.

It is contended by counsel for respondent that the sand washed into the river from the several cuts made by the

respondent cannot be regarded as a contributing cause to the filling of the bed of the river, for the reason that an equal or greater amount of sand and silt was deposited in the old channel after the new channel was established by the cuts. In the absence of other proof, which does not appear in this case, it would not follow as a necessary conclusion of fact that these cuts, by reason of the filling up of the old channel due to a decrease in the rapidity of the current therein, had not caused a greater deposit in the bed of the river below the cuts than would have been the case if the cuts had not been made. That would depend largely upon the character of sand and silt deposited in the old channel. A fine silt, which the normal flow of the river would carry off, leaving little or no deposit in its bed, carried from time to time into the old channel, would there be deposited owing to the sluggish current being unable to hold it in suspension, and would eventually fill the old channel. The mere fact that an equal or greater cubic content of sand and silt was deposited in the abandoned channel, without other proof, would be of little weight, in view of the fact that known laws of hydraulics determine that a stream's carrying capacity of sand, silt, or other material has a fixed ratio to the velocity of the current.

In addition to the silt from the cuts mentioned, there must have been other causes contributing to the filling of the river. It is a well-known law of hydraulics that the more the volume of water in a stream is decreased the slower it flows, and consequently the greater is the increase in sedimentary deposit. There were on, or just above, the ranch of plaintiff, during at least a portion of the time when it is claimed the backwater from the Spragg, Alcorn & Bewley dam caused the deposit of silt to which the overflows are attributed, at least five ditches which took water from the river, thereby decreasing the flow of the water in the river, and correspondingly increasing the deposit of silt. The last one of the ditches to be constructed was the Perazzo ditch, in 1903, upon plaintiff's land, and with his consent. As we view the case, each

of the ditches alluded to contributed its share to the filling up of the river.

4. It is the contention of appellants that, under such circumstances, they are liable only to the extent to which they contributed to the injury to plaintiff's ranch. We think their contention as to the law is correct. In the case of *Blaisdell v. Stephens*, 14 Nev. on page 21, 33 Am. Rep. 523, Mr. Justice Hawley, in delivering the opinion of the court, the case being similar to the one at bar, said:

"The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other."

This view is sustained by ample authority: Gould on Waters, sec. 222; *Miller v. Highland D. Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; *Gallagher v. Kemmerer*, 144 Pa. 509, 22 Atl. 970, 27 Am. St. Rep. 673; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Watson v. Colusa*, 31 Mont. 513, 79 Pac. 15; *Woodland v. Portneuf*, 26 Idaho, 289, 146 Pac. 1106; *South Bend M. Co. v. Lyshart*, 12 Ind. App. 185, 39 N. E. 908; *Harley v. Merrill B. Co.*, 83 Iowa, 73, 48 N. W. 1000; *Swain v. Tenn. Copper Co.*, 111 Tenn. 430, 78 S. W. 93; *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. Rep. 656; *Draper v. Brown*, 115 Wis. 361, 91 N. W. 1001.

5. Error is assigned to the overruling of an objection by the defendants to the following questions propounded to the plaintiff:

"Q. Who, if any one, warned you of the building of the dam (referring to the S., A. & B. dam), and the effects of the raising of the dam? A. One in particular was Mr. N. H. A. Mason. He is dead now. He was an owner in the Spragg, Bewley, Alcorn.

"Q. What did he say about it? A. He was speaking about that dam. He had men, or his foreman, and so on, had helped build the dam there for a number of times, and Mr. Mason says to me, 'if they keep building that dam up, some day it is going to ruin your place,' and it

was about the time, or very near the time, that I gave Mr. Mason a deed of one-half of my water right. I think it was in 1889, somewhere along there."

At most, this testimony did not purport to be more than the giving of evidence of a statement made by one of what might or would happen at some time in the future, as distinguished from a statement as to an existing fact. It was a mere prophecy. We are unable to call to mind any rule, or conceive of any reason, which would justify the court in receiving such testimony. (*Burt v. Wigglesworth*, 117 Mass. 306.) It is contended on the part of respondent that this testimony is proper because Mason owned the Miller & Lux ranch at the time it is alleged he made the statement. Conceding that the theory advanced as to the law is correct, we find no evidence in the record to sustain it.

6. On the trial defendant objected to certain questions going to establish the extent of plaintiff's damage. The witness William Rallens was asked:

"Q. In examining the ranch, did you form any opinion as to the extent of the damage caused to the land by the overflow? A. I did.

"Q. What in your judgment, then, from your examination, do you consider the land overflowed was damaged? A. I consider two-thirds of its value."

We think the objection should have been sustained. If the witness was qualified, he might have testified as to the value of the land before and after the overflow. Such would have been the proper method of arriving at the damage. (*Howell v. Medler*, 41 Mich. 641, 2 N. W. 911; *Upcher v. Overlander*, 50 Kan. 315, 31 Pac. 1080; *International R. Co. v. Fickey*, 125 S. W. 327; *Louisville R. Co. v. Sparks*, 12 Ind. App. 410, 40 N. E. 546; *Van Deusen v. Young*, 29 N. Y. 20; *Tenn. Co. v. McMillan*, 161 Ala. 130, 49 South. 880; *Central Ry. Co. v. Barnett*, 151 Ala. 407, 44 South. 392.)

7, 8. Prior to the trial of the case, the deposition of plaintiff was taken, on the motion of defendants. Upon the trial defendants objected to certain questions asked

the plaintiff on cross-examination by his attorneys at the taking of the deposition. One of the questions was:

"Q. Take for five years before the floods, Mr. McLeod, how much, on an average, did you clear off of this entire ranch?"

There were several just such questions to which objections were made and overruled. It is the contention of defendants that, notwithstanding the fact that the deposition was taken at their instance, plaintiff having offered the deposition in evidence, he made it his evidence, and that, if their objections are meritorious under the accepted rules of evidence, they ought to have been sustained. Section 3505, Cutting's Compiled Laws, provides:

"When a deposition has once been taken, it may be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it."

In section 3504, Cutting's Compiled Laws, it is provided:

"* * * And thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions."

It would appear that the statute has pretty clearly declared the rights of the respective parties in such matters, the statute itself providing that the evidence shall be subject to all legal exceptions. Section 3504 also provides:

"* * * But if the parties attend at the examination, no objections to the form of the interrogatory shall be made at the trial, unless the same was stated at the time of the examination."

This seems to leave no room for doubt as to the meaning of the exception quoted above. The logic of the situation is that the court could rule upon the legal sufficiency of the matter involved upon the trial, while an objection to the form of the question should be pointed out at the time of the taking of the deposition, that it may be corrected at that time if the objection is deemed serious by the opposing party. It was said in *Hatch v. Brown*, 63 Me. 410:

"When a party uses a deposition taken by his opponent, but not offered in evidence by him, he makes it his own, and his opponent has the same right of objection to the interrogatories and answers which he would have had if the deposition had been taken by the party offering it; and he is not precluded by the fact that the interrogatories objected to were propounded by himself when the deposition was taken."

See, also, *In Re Smith*, 34 Minn. 436, 26 N. W. 234; 6 Ency. Pl. & Pr. p. 585.)

We can conceive of no theory upon which such testimony would be proper as a basis for the fixing by the jury of plaintiff's damages. The objection should have been sustained.

Counsel for appellant, and counsel appearing *amicus curiæ*, have urged very forcibly that this court ought to hold that, in the absence of negligence, there could be no liability in damages in this case, even assuming that a dam could cause a deposit of sand in the bed of a river above the highest point of backwater, for the reason that dams in river channels are essential to irrigation in this state; that the law recognizes irrigation not only as lawful but as specially favored in the law; and that damage, caused otherwise than by direct overflow, incapable of being foreseen or guarded against, is such a consequential damage that no liability in the law exists therefor. Many authorities, applicable to public or quasi-public utilities, are cited in support of this contention. We have no hesitancy in saying that this rule ought to be held applicable in cases of irrigation dams, but we are not prepared to say that it should be applied to every sort of irrigation dam that might be constructed. In a stream carrying large quantities of sand and silt during portions of the year, it might be regarded as negligence to maintain a solid dam, while the maintenance of a dam with movable gates, by which the flow of the river and the deposit of silt could be regulated, could not be held to be negligence, and no liability for damage could be

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chargeable thereto, otherwise than an overflow due directly to backwater.

While there are various other errors assigned, we deem it unnecessary to consider them.

It is ordered that the order and judgment appealed from be reversed, and that the case be remanded.

NORCROSS, C. J., concurring:

I concur in the judgment and in the opinion of Mr. Justice COLEMAN. The case is of such unusual character that I venture to add some additional supplementary observations. Whether defendants were liable to respond in damages for the injury done to plaintiff's property caused by the Walker River overflowing its banks during the years 1904 to 1907, inclusive, has presented for determination intricate questions, both of law and fact, which the court, notwithstanding the aid of elaborate briefs of respective counsel, has found no little difficulty in determining. If the contention of counsel for appellants—that the injury, even if occasioned in the way claimed by respondent, was remote and consequential and for which no remedy in law was afforded—could have been sustained, the necessity for considering other questions would have been eliminated.

It is conceded in this case that the overflows which occasioned the damage were not caused by backwater from the dam. If the dam complained of had raised the water in the river to the top of the banks at the dam, the water level would be 11.42 feet below the bank at the highest point of overflow. The banks of the river at other points of overflow varied from about $4\frac{1}{4}$ to 8 feet higher than the banks of the river at appellants' dam. Respondent's theory rests upon the contention that the current of the river will be affected above the level of backwater by reason of the deposit of sand and silt due to a checking of the velocity of the current within that portion of the river affected by backwater. It is here we have the conflicting views as to whether this can or cannot

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happen in accordance with natural laws. It is conceded that sand and silt carried in suspension in a stream will not be deposited in the channel unless the velocity of the stream is checked to such an extent that it has not the necessary carrying power to longer hold it in suspension. It is a known law of hydraulics that all portions of a cross-section of a stream have not the same velocity, and this variation in velocity causes some deposit of sand and silt upon the bed of the stream. Plaintiff's whole case rests upon an application of the known law of hydraulics that a reduction in the velocity of a stream carrying sand or silt in suspension will cause such sand or silt to be deposited on the bed of the channel.

Whether this law of hydraulics is applicable to the facts of this case—that is, whether appellants' dam can have the effect of decreasing the velocity above the level of backwater—is the question upon which plaintiff's counsel and witnesses differ in opinion from the opinions of the expert witnesses upon hydraulics. The point I wish to emphasize here, however, is simply that an established law of hydraulics is invoked to prove that the appellants' dam is the sole cause of plaintiff's injury, when from the undisputed facts in the case it is impossible that it could have been the sole cause of the filling of the river channel by a deposit of sand and silt, for the reason that other agencies under known laws of hydraulics contributed to a greater or less degree in checking the velocity of the current. The volume of water naturally flowing in the river was reduced by the numerous ditches diverting water from the river upon or above the ranch of plaintiff and above defendants' dam. Necessarily these ditches reduced the volume of water in the river below, and hence necessarily reduced the velocity of the current. It has been contended, for example, that appellants' dam was the sole cause of the filling of the river above that dam, and below the Merritt dam, and that the Merritt dam could not have had any effect in filling the river below the latter dam. The Spragg,

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Alcorn & Bewley dam caused a deposit of sand and silt between the two dams, because it decreased the grade of the river to a level for the distance it caused backwater; the reduction in grade causing a reduction in velocity. The Merritt ditch caused a reduction in the volume of water flowing below the Merritt dam, and this reduction in volume caused a corresponding reduction in the velocity of the current. It certainly is immaterial whether velocity is reduced by a cause which affects the grade or a cause which affects the volume—both contribute to the deposit of sand and silt.

An application of these established laws of nature to the facts of this case illustrate the reason why the opinion of nonexpert witnesses upon the ultimate fact in the case ought not to be permitted. Courts are bound to apply known natural laws so far as they are applicable. A lack of knowledge of known natural laws may cause a witness to form an entirely erroneous opinion as to the cause of a certain effect. The witnesses in this case who testified that the Spragg, Alcorn & Bewley dam was the cause of the overflow were undoubtedly perfectly convinced of the correctness of their opinion and honest in its expression, but the physical facts and known laws of hydraulics are conclusive that those opinions were in part, at least, erroneous.

The long delay in the determination of this case is regretted extremely. Changes in the personnel of the court making necessary a reargument and reassignment of the case, the voluminous record, number, newness, and importance of the questions presented, and an endeavor to harmonize conflicting views, account for a delay in the decision which has been seemingly unreasonable.

MCCARRAN, J., dissenting:

I dissent.

This case was originally assigned to the writer for the preparation of the opinion of the court. In view of the position taken by the majority of the court, I am herewith

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setting forth only so much of my opinion originally prepared as I deem applicable to the matters touched upon in the prevailing opinion.

The prevailing opinion in this case rests primarily upon the contention of appellants that it was a physical impossibility for the Spragg, Alcorn & Bewley dam to cause the overflow in question. The principal ground asserted in support of this declaration is the fact that a horizontal line drawn from the crest of the dam would intersect the river bed at a point far below the place where the flood waters broke from the river channel and flowed over the premises of McLeod. However true it may be that the current of a stream will not be affected by an obstruction above a point where a horizontal line passing over the crest of the obstruction would strike the bed of the stream, this rule cannot be strictly applied, and, in fact, will not apply at all, where the stream, as in the case at bar, is one which during certain seasons of the year carries great quantities of silt and sand in its current.

Evidence was introduced in this case of levels taken from the dam up the Walker River, for the purpose of showing that the waters of the Walker River were not affected or raised as far up the river as the point of overflow. Testimony of engineers versed in the subject of hydraulics was introduced, tending to establish that the dam in question could not affect the river above the point where a horizontal line from the crest of the dam would intersect the bottom of the river. Testimony was introduced to show that this point of intersection was far below the premises of respondent affected by the overflow. On the other hand, testimony was introduced coming from witnesses who had spent many years in and about the vicinity of the property in question, and who had for many years past observed the action of the Walker River, and these witnesses, basing their statement on their observation and experience, testified not only that the bed of the river was filled with silt and sand and debris as a direct result of the dam in question, but that the overflowing of respondent's premises was

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caused by the dam. In this respect, we find a direct conflict between the testimony of the experts offered on behalf of appellants based on scientific investigation and that of nonexperts based on actual observation and experience.

It is manifest that the jury, having heard both sides of the testimony, were convinced by the latter. Indeed, we believe, as has been well asserted by other courts, that, owing to the impossibility of arriving at precisely accurate results by the use of instruments, running over many miles in extent, involving, as in this case, a great number of stations and the adjustment, taking and registering of levels thereat, and the many different circumstances, explainable and unexplainable, which effect the action of water when obstructed and ponded in running streams, actual tests by observation and experience afforded the most satisfactory testimony upon which to rely in determining the results from such obstructions. (*Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243; *Brown v. Bush*, 45 Pa. 61; *Decorah W. M. Co. v. Greer et al.*, 58 Iowa, 86, 12 N. W. 128.)

In the case of *Turner v. Hart*, *supra*, the Supreme Court of Michigan, in considering a similar subject, said:

"Every author treating upon the subject of hydrodynamics acknowledges and points out the difference between theoretical and actual tests, and, in advancing practical rules, modifies the theoretical to correspond as nearly as possible to actual observation and experience. We think the observation and experience of the witnesses introduced by complainants is controlling when brought in conflict with instrumental measurements, however accurately and carefully taken."

In the case of *Hand v. Catawba Power Co.*, 90 S. C. 267, 73 S. E. 187, the Supreme Court of South Carolina, in dwelling upon a subject analogous to the one at bar, said:

"According to the testimony of defendant's engineers, the fall in the creek from plaintiff's mill to the back-water from defendant's dam is about 23½ feet, and they say that it is a physical impossibility for defendant's

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dam to have caused plaintiff's injury. Notwithstanding, there was testimony which reasonably warranted a contrary opinion, and the jury took the contrary view, and found a verdict for the plaintiff, upon which judgment was duly entered."

The question of the effect of an obstruction on a running stream, and as to the distance upstream within which the flow may be affected, has been one much discussed by authorities on the subject of hydraulics. Where conditions are uniform and constant, where the grade is regular and the dimensions are fixed, the rule sought to be relied upon by appellants, by reason of which they claim it to have been a physical impossibility for their dam to have caused the flood, is one which for all practical purposes is invariable. But where conditions are such as those presented in the case at bar, wherein the effect of an obstruction thrown across a running stream is to be calculated, there is no rule, so far as we are able to ascertain from the authorities on this subject, that is invariable or can be definitely relied upon.

The record here, and especially that portion of it wherein the testimony of skilled engineers was produced on behalf of appellants, discloses constantly changing conditions in the Walker River. The measurements and calculations were taken by the establishment of stations at given distances above the dam, and at each station there was found to be change in velocity, change in depth, difference in slope, in width of stream bed, as well as differences in direction and force of the flow. It is by reason of these differences in the fundamental things essential for strict computation that the rule sought to be relied upon by appellants in this case fails, in my judgment, to be applicable.

Prof. Mansfield Merriman, of the department of civil engineering of Lehigh University, in his Treatise on Hydraulics, speaking on this subject, says:

"When a dam is built across a channel, the water surface is raised for a long distance upstream. This is a fruitful source of contention, and accordingly many

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attempts have been made to discuss it theoretically in order to be able to compute the probable increase in depth at various distances back from a proposed dam. None of these can be said to have been successful, except for the simple case where the slope of the bed of the channel is constant and its cross-section such that the width may be regarded as uniform and the hydraulic radius be taken as equal to the depth." (Merriman on Hydraulics, 9th Ed. p. 353.)

This learned author, in discussing the subject of the applicability of the rule to streams of varying slope, width, depth, and velocity, emphasizes the impossibility of accuracy under such conditions, even where, as in the case at bar, the stream is divided into reaches, wherein the slope, width, depth, and velocity can be regarded as approximately constant; and in this respect he says:

"Even if this be done, the results of the computations must be regarded as liable to considerable uncertainty."

In the case at bar, a greater and even more complicated problem presents itself, in our attempt to enforce the rule sought to be relied upon by appellants. The application of the rule contemplates as a primary condition a minimum of solids in suspension. The record here, in so far as the testimony of many witnesses is concerned, and the photographs admitted in evidence, presents conditions which make the enforcement of the rule and its applicability even more uncertain and unreliable, if not impossible. The Walker River is a meandering stream, much given to cutting and washing, and hence to changing its course and bed. Its source and supply of water are from the snow banks on distant mountain ranges. The amount of water in its flow depends largely upon the supply of snow and its melting condition, the volume of the flow being usually greater during the spring months when the lower snow deposits melt and their waters find a common source in the Walker River. During this season, by reason of this increased volume and the new channels through which it passes to the river bed, and the natural erosive action of the river itself, there is carried in

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suspension great quantities of silt, sand, and general debris. When this water, highly impregnated with soils, is obstructed, the creation of dead water upstream from the obstruction causes a deposit of the solids held in suspension, and this deposit takes place in the order of the specific gravity of the substances carried.

It is generally conceded by all authorities on the subject of hydraulics that the rule sought to be applied by appellants here is one which is attended with uncertainty, except under ideal conditions. The rule is not strictly applicable, except in case of a river or canal of practically uniform width and uniform slope in the direction of the flow.

Taking into consideration the testimony of the witnesses whose years of experience and opportunity for observation permitted them to testify as they did as to the cause of the overflow being the dam, the jury was warranted in finding, and had substantial evidence before it upon which to find, that, notwithstanding the testimony of the experts whose scientific investigation caused them to testify that it was a physical impossibility for the Spragg, Alcorn & Bewley dam to affect the flow of the Walker River to such a point upstream as would cause the overflowing of respondent's premises, the dam in question directly and indirectly brought about the overflow and injury to the premises of respondent. As I have already stated, the whole premises, the river, and the various dams and obstructions, were viewed by the court and jury, and this opportunity for observation afforded the jury, together with the testimony of the witnesses as to the cause of the overflow which inundated the premises of respondent, was sufficiently substantial to warrant us in applying the rule that though there may be some conflict in the evidence as to the agency which caused the flooding of respondent's premises, inasmuch as the general verdict of the jury was in effect that it was the obstruction maintained by appellants, the finding in this respect should not be disturbed.

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In this connection it may be well to observe that, in view of the issues joined in this case, it can make no difference whether the flood which injured respondent was caused as the direct action of the dam maintained by appellants, or whether the same was caused by reason of the filling up of the channel of the river with sediment due to the action of appellants' dam. The sediment and sand deposited in the channel of the river may have been, and probably was, an intervening agency; yet if this intervening agency was established as the direct result of the act of appellants in enlarging and raising the dam, and if the action of the dam, in conjunction with the action of the sediment, filling up the channel of the river, caused the river to overflow and flood the premises of respondent, then, the dam of appellants being the first wrong done, the consequences, as well as every intermediate result, such as the filling of the channel of the stream with sand and sediment, or the creation of islands or bars or the changing of the current, are to be considered in law as the proximate result of the first wrongful cause.

It cannot be denied that there may be occasions where the rule of physical impossibility would be manifest, and in this respect our attention is directed to the case of *Lowery v. San Joaquin & Kings River Canal & Irrigation Co.*, 134 Cal. 185, 66 Pac. 225. Appellants, in their brief and oral argument, lay much stress upon the force and effect of this decision as being applicable to the case at bar, but there are vital distinguishing features. In the Lowery case, *supra*, the land inundated was low, and part of it was designated as swamp and overflow land. Before the erection of the dam in the San Joaquin River, it had been constantly subjected to overflow in wet seasons. In that case, it appears, there was a total absence of any direct evidence that defendants' dam caused the overflow complained of. That it was a physical impossibility for the dam complained of to have caused the overflow in that case was testified to by experts produced by

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the defendant company, and was practically admitted by the expert offered on behalf of plaintiff. The court in its decision especially comments on the fact that plaintiff's expert not only admitted the insufficiency of his data, but nowhere testified that the dam did affect or could have affected the waters of Four Tree slough, the channel complained of.

There is another element in that case which distinguishes it from the case at bar. We find in the decision the statement:

"For more than five years prior to the flooding of plaintiff's land, the dam was continuously maintained at its present height."

Moreover, that case presented facts which established without conflict that plaintiff's land was constantly subject to overflow at high water. In my judgment, the case affords nothing that would assist us in the solution of the problem at bar.

Nor are we afforded any assistance by the case of *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413, referred to in appellants' brief.

It is the contention of appellants that inasmuch as they and their predecessors had the legal right to construct and maintain the ditch known as the Spragg, Alcorn & Bewley dam, and to erect and maintain the dam and divert the waters for the purpose of irrigation, they cannot be held liable in this case. They further contend that no direct trespass being alleged, and there being no allegation that the dam directly overflowed the land, they can be held liable only in case of negligence; they contend further that no negligence was established by the evidence, hence no liability attaches.

The general rule applicable to this phase of appellants' contention is that every man has a right to have the use of the flow of water in its natural channel in his own land. In using it, however, the owner must so divert the water and so apply it as to work no material injury or annoyance to his neighbor, either above or below him. It is the duty of a party erecting an obstruction in a natural

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stream, especially where there are adjoining owners whose lands and premises might be subject to new conditions arising in the stream by reason of his obstruction, to notice not only the effect of his obstruction at the time of its erection, but its effect at all seasons of the year. Where it is a known fact that the flow and quantity of water in a stream vary with the seasons of the year—the spring bringing its freshets, and the fall bringing its scarcity of water—such condition should be expected and anticipated by one seeking to obstruct the flow. It has been held by eminent authority that it is the duty of one who attempts by means of a dam or obstruction to impound the flow of a stream to calculate the probable effects of the dam in the several seasons of the year on the property of his neighbor above, as well as below, his obstruction. "A neglect to use the necessary precaution," says the court in *Bell v. McClintock*, 9 Watts (Pa.) 119, 34 Am. Dec. 507, "or a miscalculation of its effects, where it works an injury to another, may be compensated in damages." And the court, in this respect, further lays down the rule:

"When, however, the injury arises from causes which might have been foreseen and avoided, as in the cases of ordinary periodical freshets, it is but right that he whose superstructure is the immediate cause of the mischief should bear the loss. In that case there is the concurrence of negligence with the act of Providence, which, as it is seen, is the criterion of liability."

To the same effect we find the cases of *McCoy v. Danley*, 20 Pac. 85, 57 Am. Dec. 680; *Talbot et al. v. Whipple*, 7 Gray (Mass.) 122.

In the case of *Hagge et al. v. Kansas City S. Ry. Co.* (C. C.) 104 Fed. 391, certain pilings used by the railway company in the construction of its bridge across a water-course were, after the completion of the bridge, cut off and left at such height above low-water mark as to occasion an accumulation of debris which obstructed the natural current of the river and thereby caused the water to run over the natural bank onto adjoining lands. The act of

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the railway company in so cutting off and leaving the pilings, with the consequent damages, was held to constitute negligence. In that case, the court, having the matter under consideration on demurrer, said:

"If the defendant is maintaining such nuisance, and this occasions the overflow of the water, flooding the complainants' land, and injuring the crops, it presents ground of action."

To the same effect is the case of *Brink v. Railway Co.*, 17 Mo. App. 177.

In the case of *Hardin v. Ledbetter*, 103 N. C. 90, 9 S. E. 641, it was held that where the owner of a mill-dam removed his obstruction, thereby causing the accumulation of mud and debris to pass downstream and fill up the mill-pond of another to such an extent as to back the water to the injury of the party who removed his obstruction, the latter could recover damages caused by the backwater.

To the same effect, we find the case of *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287.

In the case of *Cline v. Baker*, 118 N. C. 780, 24 S. E. 516, it was held that if a dam and pond in a stream were the direct cause of the injury, although such injury was aggravated by other causes over which he had no control, the defendant would still be liable. And the same is the holding of the court in *State v. Holman*, 104 N. C. 861, 10 S. E. 758.

This rule is especially applicable to the case at bar, inasmuch as the record tends to establish that the Spragg, Alcorn & Bewley dam caused the bed of the river to be filled with silt and debris which formed bars and islands, which in turn, as a natural consequence, affected the flow of the stream. The formation of these bars and islands is established not only by the testimony of many witnesses, but by the photographs admitted in evidence and found in the record of the case.

In his work on Waters and Water Rights, Mr. Farnham says:

"The riparian owner is not bound to keep the channel

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of the stream free from debris which may find its way there naturally, and is not liable for injury to upper property owners by the fact that its accumulation in the stream sets the water back over the boundary line. But, in erecting artificial structures in or across the stream, he is bound to take notice of the liability of such material to be impeded by the obstruction and so become a menace to upper property, and he will be liable in case he builds his structure in such a way that it will necessarily cause drifting material to dam the water back, or in case he fails to remove the material after he sees that it is being piled up so as to form a dam." (Farnham on Waters and Water Rights, vol. 2, sec. 570.)

The assertion of the learned author in this respect is supported by eminent authority. I deem it especially applicable to the conditions presented by the record in this case, for, as I have already stated, the obstruction in the Walker River known as the Spragg, Alcorn & Bewley dam was in the first instance but a slight obstruction, thrown partially across the bed of the stream. As years passed, the ditch known as the Spragg, Alcorn & Bewley ditch, into which the dam was intended to divert the water, filled more or less with sediment and debris, and, as such condition progressed, the dam in question was raised and enlarged, and its effect was to impound such silt or sediment or debris as naturally passed down the channel, thus filling up the natural bed of the river. We find the doctrine asserted here supported by abundance of authority: *Blizzard v. Danville*, 175 Pa. 479, 34 Atl. 846; *Ames v. Dorset Marble Co.*, 64 Vt. 10, 23 Atl. 857; *Schuylkill Navigation Co. v. McDonough*, 33 Pa. 73; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885; *Kroeger v. Twin Buttes*, 13 Ariz. 348, 114 Pac. 553, Ann. Cas. 1913E, 1229.

We are referred to the cases of: *Fleming v. Lockwood*, 36 Mont. 384, 92 Pac. 962, 14 L. R. A. n. s. 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263; *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Lapham v. Curtis*, 5 Vt. 375, 26 Am. Dec. 310; *Hoffman v. Tuolumne County Water Co.*, *supra*.

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While the rule laid down by the courts in these cases might be applicable to a different set of circumstances than those presented in the record, nevertheless it has been held in many cases that a direct injury may result and be actionable from the construction of a dam across a stream by which the stream is caused to be filled with sand and to overflow the premises of upper landowners. (*Avery v. Vermont Electric Co.*, 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, and note, 98 Am. St. Rep. 818; *Winchell v. Clark*, 68 Mich. 64, 35 N. W. 907; *Morris v. Commander*, 25 N. C. 510; *Haas v. Choussard*, 17 Tex. 588; *Masonic Temple Assn. v. Banks*, 94 Va. 695, 27 S. E. 490; *Miller v. Stowman*, 26 Ind. 145; *Coloney et al. v. Farrow*, 91 Hun, 82, 36 N. Y. Supp. 164; *Junction City Lumber Co. v. Sharp*, 92 Ark. 538, 123 S. W. 370; *Moffet v. Brewer*, 1 G. Greene, 348; *Hill v. Ward*, 2 Gilman, 285; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Broadway Mfg. Co. v. Leavenworth T. R. B. Co.*, 81 Kan. 616, 106 Pac. 1034, 28 L. R. A. n. s. 156, and note.)

The prevailing opinion holds as error the action of the trial court in permitting witnesses to give their opinions as to what caused the river to fill with sand and as to what caused the overflow on the McLeod land; and appellants direct our attention to the testimony of respondent's witnesses, Harry R. Warren, William Rallens, Charles T. Martin, T. G. Nichol, G. H. Baker, J. C. Mills, Frank Feigenspan, James Nichol, Chas. McLeod, G. B. Waldo, and Angus McLeod. The first objection raised to this class of testimony is that none of these men had any particular scientific training or instruction on the subject of hydraulics or the effect of dams upon the current of streams or the deposit of sand and sediment in streams. It is asserted by appellants that while some of these witnesses were more or less conversant with this particular dam and the river and the McLeod ranch, and were in a position to observe what took place, others did not know the fall or grade of the water through which the river flowed, and were not present when the river overflowed and did not know where it overflowed, and were not familiar with

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other obstructions between the point of overflow and the Sprigg, Alcorn & Bewley dam.

To the witness Harry Warren was propounded this question:

"Q. What is or was the cause of the river filling there with debris as you have described it above the Spragg, Alcorn & Bewley dam in the river to the point you have described?

"Mr. Treadwell—We object on the ground that it calls for the conclusion of the witness, and not for any fact; and it takes from the jury the determination from the facts of the ultimate question in the case. We object on the further ground that, in as far as it asks for the opinion of the witness, the witness has not qualified and is not shown to be an expert on any subject that would permit him to give his opinion to the jury.

"The Court—Gentlemen, before the noon recess I made a ruling on the matter of the admissibility of certain testimony here, which I have been considering, and which I now retract, owing to the fact that this witness, Mr. Warren, has shown himself, to the satisfaction of the court, by his testimony to be an expert. His knowledge and experience during the fourteen years that he has lived on or near the Walker River, and his familiarity with the river, dam, ditches and sloughs, concerning which his testimony has been given, has sufficiently qualified him to give evidence as to the filling of the river with sand. The rule of law is, where one is qualified to testify to certain facts, he may give his opinion as an expert. There are certain facts which the witness is supposed to have peculiar knowledge of, and for that reason the objection is overruled."

The witness William Rallens was interrogated, over the objection of appellants, as to cause of the sand and sediment in the river, and as to what caused the river to overflow its banks. The record is as follows:

"Q. Do you know how the water of the river came to overflow on those places along the ranch, as you describe it? A. I do.

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"Q. What was the cause of the overflow on the McLeod place? A. By building up the dam, causing sand and sediment in the river, and causing the river to overflow its banks.

"Q. What dam do you refer to? A. The Spragg-Bewley-Alcorn dam."

The witness Charles T. Martin was interrogated:

"Q. What was the cause of the damage to the land? A. Well, the cause was, the river bed was full of sand, and the water had to flow out some place?

"Q. Do you know the cause of the filling of the river with sand? A. Yes.

"Q. Now, what was the cause? A. Well, from my experience being on that river, I know that dams cause the sand to form in the river.

"Q. Now, as to this place, the particular place known as the McLeod place, what particular dam do you have reference to as having caused the deposit of sand? A. I have reference to the Spragg-Bewley-Alcorn dam."

The witness T. G. Nichol was interrogated, and testified:

"Q. Do you know what caused the deposit of sand in the channel of the river above the Spragg-Bewley-Alcorn dam? A. Yes.

"Q. What was the cause of the deposit of sand in the channel of the river above the dam, and up as far as the ford at the McLeod house? A. The dam, the Spragg-Bewley-Alcorn dam.

"Q. Do you know what caused the overflow? A. The river not having capacity to carry the water.

"Q. Why didn't it have the capacity? A. The river filling up with sand."

The witness G. H. Baker was interrogated, and testified as follows:

"Q. Do you know what effect the building of these brush dams has upon the bed of the river above the dams? A. I do.

"Q. What is that effect? A. Naturally fills the bed of the river with sand. A dam would not stay there if you

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don't get sand piled up to hold it there when high water came.

"Q. Take a dam, say from six, seven, or seven and one-half feet in height, how far will the sand back up back of the dam, in the river bed, in course of time?

A. A dam six or seven feet, down in the valley where there is not much fall, will probably back sand for two miles."

At another place, later on, the witness was interrogated, and testified:

"Q. Now, then, do you know what caused the damage to the McLeod ranch? A. Yes.

"Q. What was the cause? A. The carrying capacity of the river was so filled up with the debris and sand that the sand overflowed its banks.

"Q. Then, as a matter of fact, it was simply because the carrying capacity of the river was lessened by means of this filling you speak of? A. Yes.

"Q. What was it that lessened it, this carrying capacity? A. My judgment, this dam put in the river filled it up.

"Q. Which one do you have reference to? A. Spragg-Bewley-Alcorn dam."

The witness J. C. Mills was interrogated, and testified:

"Q. Now, then, do you know what caused the sand to fill in the river at or near the headgate of the Merritt ditch? A. Yes.

"Q. Now, then, what was the cause of the sand gathering in and filling in the river bed? A. It was the Spragg-Bewley-Alcorn dam.

"Q. Do you know the cause of this overflow of the McLeod ranch? A. Yes.

"Q. Now, then, what was the cause? A. The reason of the overflow was the channel of the river was plumb full of sand and sediment. There was no room for the water in the old channel, and it had to get away some place.

"Q. Do you know the cause of this filling of this sand in the river, as you described it? A. Yes.

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"Q. What was the cause? A. The Spragg-Bewley-Alcorn dam."

The witness Frank Feigenspan was interrogated, and testified:

"Q. What was the cause of the river filling so with sand at that point near the head of the Merritt ditch above and below? A. The Spragg-Bewley-Alcorn dam."

The witness J. E. Gignoux was interrogated, and testified:

"Q. Do you know what caused the overflow on the ranch as you found it? A. Yes.

"Q. What was the cause? A. The dam.

"Q. Now, if you know, I wish you would explain to the jury what effect that dam had upon the river, and why it caused the overflow? A. The dam checked the flow of the water, causing a deposit of sand gradually to fill up the bed of the river and channel."

The witness Charles A. McLeod was interrogated, and testified:

"Q. Do you know what effect the building of that dam, as you have described it, has had upon the bed of the Walker River? A. I do.

"Q. What was that effect? A. Had the effect of filling the river with sand.

"Q. How far up the river, if you know, has this dam caused the river to fill with sand? A. Up in the neighborhood of the house.

"Q. Now, then, do you know the cause of the overflow and damage to the McLeod ranch, and crops growing on it? A. Yes.

"Q. What was the cause? A. The Spragg-Bewley-Alcorn dam."

The witness G. B. Waldo was interrogated, and testified:

"Q. Do you know what brought about this change in the condition of the river at that point, near the Spragg-Bewley-Alcorn ditch, as you saw it in 1905 or 1906? A. Yes, I know.

"Q. What was the cause? A. The cause was by putting the dam in.

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"Q. Describe the effect of that dam on the bed of the river above the dam through the McLeod place. A. They put a dam in the river, and it may back up for a quarter of a mile; if you keep building the dam up, it will back for a quarter of a mile until the current stops running, and this works on the river for a quarter of a mile or more, and then it fills the channel of the river with sand and sediment.

"Q. Do you know what caused the overflow of the McLeod place? A. Yes.

"Q. What was the cause of the overflow of the McLeod place, as you found it when you were there? A. By this dam being put in and making the channel of the river smaller and shallower."

The respondent Angus McLeod, being interrogated as to the cause that brought about the flooding of his premises, said:

"Well, I had better not say, I might not know, but I do know that it was caused by this dam in the river, I am positive; I know what it was; every one of them know that the dam caused the river to fill up and overflow."

Whatever might be observed with reference to the individual witnesses whose testimony is assigned as error, there are certain facts disclosed by the record applicable to all. It is the contention of respondent that these witnesses were fully qualified as experts. It is sufficient to say, however, that each one, according to the record before us, appears to have been more or less familiar with the Walker River, its nature and ordinary action, familiar with the dam known as the Spragg, Alcorn & Bewley dam, and familiar with the land and premises of respondent overflowed or inundated by the waters of the Walker River. Moreover, it is disclosed by the record that each of these witnesses had more or less experience in the construction and use of dams in this particular locality, and in this particular stream, and had by reason of their experience in this respect acquired at least some knowledge of the nature of the stream and its habits, or what it ordinarily did in the way of depositing

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sand, silt, or sediment above obstructions thrown across it or placed so as to affect its current. Moreover, each one of these witnesses, according to the record, had been present on and about the McLeod ranch and premises at the time of the floods complained of and had observed the action of the Spragg, Alcorn & Bewley dam on the Walker River during the flood seasons.

The matter elicited by the interrogatories and the answers given were in each instance with reference to the subject about which the witnesses had qualified themselves, by more or less observation and experience, to testify. The weight of the testimony and its significance were in each instance matters for the jury. The reception or entertainment of such testimony has by some authority been regarded as a matter largely within the discretion of the trial court. (*Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487.)

I am favorably inclined to the doctrine set forth in the case of *Hand v. Catawba Power Co.*, 90 S. C. 267, 73 S. E. 187, wherein the court, considering a matter analogous to the one at bar, said:

"The court allowed plaintiff's witnesses, who were not experts, but who had, for many years, known and observed plaintiff's water power, and were familiar with the creek and the surrounding country, and had observed the results of freshets in the creek and river, to express their opinion that defendant's dam caused plaintiff's injury. The defendant contends that the ruling was erroneous. The rule is well settled that, when the matter or thing to which the evidence relates cannot be reproduced or clearly described to the jury, the witness, though not an expert, may give his opinion, after stating the facts and circumstances upon which it is based."

This doctrine is also supported by decisions in the case of *Seibles v. Blackwell*, 1 McMul. (S. C.) 56; *Jones v. Fuller*, 19 S. C. 66, 45 Am. Rep. 761; *Chemical Co. v. Kirven*, 57 S. C. 445, 35 S. E. 745.

The discretion which may be exercised by the trial

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court in determining the admissibility of such testimony warrants a court of review in refusing to disturb its determination, unless the record discloses manifest error on the part of the trial court and prejudice resulting therefrom.

Opinions of witnesses familiar with given premises, or, as in this case, with a given stream and the territory through which it flows, are, we think, at least as certain where such witnesses have had an opportunity to observe, and their testimony shows them to be qualified and discloses no bias, as are measurements taken on the ground either before or after the occurrence of a given incident, such as the sudden overflowing of premises during a flood season. Especially is this true where such incident and the phenomena attending it are impossible of reproduction. (*Hand v. Catawba Power Co.*, *supra*; *McLeod v. Lee*, 17 Nev. 122, 28 Pac. 124.) It has been held that witnesses who qualified as to having had the experience may properly testify as to the effect produced by a given cause with the nature and surroundings of which the witnesses are cognizant. (*Ryan v. Manhattan Big Four M. Co.*, 38 Nev. 92, 145 Pac. 907.) Learning or technical training are not always essential elements of qualification to warrant a court in receiving the testimony of a witness. There is no fixed or invariable rule established, by which a trial court shall determine the exact degree and amount of knowledge, experience, or skill an expert shall possess before permitting him to testify. (*Carscallen v. Cœur d'Alene & St. J. T. Co.*, 15 Idaho, 444, 98 Pac. 622, 16 Ann. Cas. 544.)

It has been well stated that facts testified to by witnesses are to a large extent conclusions. A witness sees a thing done or a certain act performed; he has seen the thing done and the act performed many times before; he has had opportunity and occasion for observation; his testimony as to what caused or brought about the thing performed or the act done, although, strictly speaking, it is a conclusion, is not inadmissible.

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A man who lives in the vicinity of a mountain stream, and who has had experience in the way of constructing dams in that stream for the purpose of diverting water into ditches, and knows the nature of that stream as being one that carries great quantities of silt and debris during flood season, and has had occasion to observe that the result of his obstruction placed in the stream is to impound and hold large quantities of this silt and debris, is, we think, eminently qualified to testify with reference to this subject and the causes that bring about certain conditions.

The prevailing opinion lays stress on the fact that the testimony offered in support of appellants' contention was elicited from experts and engineers trained in hydraulics, and pays a flattering tribute to one of these as being now chairman of the Fourth-section board under the Interstate Commerce Commission, and then goes on to say:

"In opposition to the testimony of defendants' engineers and the testimony of Mr. Hammond (expert called in behalf of plaintiff), just quoted, is the testimony of several ranchers who had lived in the community for a number of years."

This is indeed a sublime comparison.

The witnesses in this case, whose testimony was objected to by appellants, were, according to their testimony, residents of Mason Valley, some of them for many years, and all of them for a length of time which in my judgment warranted the court in admitting their testimony to the jury. The facts testified to, so far as physical appearances and after results were concerned, were all afterwards viewed by the jury, and they had opportunity thereby to judge of the credibility and competence of these witnesses and to come to conclusions for themselves as to whether or not the witnesses were correct in their statements as to the cause of the inundation. Whether or not there were physical facts which made the testimony of these witnesses or the conclusion

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reached by them inaccurate was a matter for the jury to determine; and they by their general verdict having determined the matter in favor of the plaintiff, respondent herein, their finding in this respect, having in my judgment substantial evidence to support it, should not be disturbed.

It is asserted by appellants that the witnesses offered by them at the trial were men of technical training and experts in the lines of hydraulics. This may be true, but appellant's argument in this respect is made to the wrong tribunal. It was a matter for them to impress on the jury, which they no doubt did present in a manner in keeping with the splendid ability of the eminent attorneys for appellants. It was for the jury to determine, after all, as to which of these witnesses they would believe. There is no rule, of which we are aware, that will compel a jury to disregard or disbelieve any competent, material, relevant evidence properly admitted. Verdicts may be arrived at on a single assertion made by the most humble, illiterate individual as against profound statements uttered by men of technical training.

Appellants complain that the witnesses whose testimony was objected to were permitted to testify positively as to the cause of the overflow of the Walker River on the premises of respondent. This, I think, is well answered in the assertion of Mr. Wharton in his work on Evidence, wherein the author asserts in substance that an opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever the condition of things is such that it cannot be reproduced to the jury. (*Hand v. Catawba Power Co.*, *supra*.)

In the case of *People v. Jennings*, 252 Ill. 534, 552, 96 N. E. 1077, at page 1083 (43 L. R. A. n. s. 1206, 1213), the court said:

"While it is usual for expert witnesses to testify that they believe or think, or in their best judgment, that such and such a thing is true, no rule of law prevents them from

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testifying positively on such subjects. It is for the jury to determine the weight to be given to their testimony." (Wharton on Criminal Evidence, 8th ed. sec. 459; 1 Wigmore on Evidence, secs. 656-659; Jones on Evidence, 2d ed. sec. 360; *Ryan v. Manhattan Big Four Mining Co.*, *supra*.)

Mr. Rogers, in his work on Expert Testimony (2d ed. p. 7), briefly asserts the rule as follows:

"The court must decide whether the subject-matter to which the testimony relates is of such a nature as to warrant the introduction of opinion evidence from nonprofessional witnesses. In deciding that question the court will be governed by the following principles: (a) It is competent for a witness to state his opinion in evidence when the primary facts on which it is founded are of such a nature that they cannot be adequately reproduced or described to the jury, so as to enable another than the actual observer to form an intelligent conclusion from them. (b) And when the facts upon which the witness is to express his opinion are of such a nature that men in general are capable of comprehending and understanding them."

This learned author quotes generously from the case of *Porter v. Pequonnoc Mfg. Co.*, 17 Conn. 249, wherein the court, in dealing with the question of the admissibility of the opinion of nonexpert witnesses, where the question was as to the strength and sufficiency of a dam to sustain a quantity of water, said:

"They (the witnesses) had acquired, by their personal observation, a knowledge of the character of the stream, and also of the dam, and were therefore peculiarly qualified to determine whether the latter was sufficiently strong to withstand the former. The opinions of such persons, on a question of this description, although possessing no peculiar skill on the subject, would ordinarily be more satisfactory to the minds of the triers, than those of scientific men, who were personally unacquainted with the facts in the case."

In the case of *County Commissioners v. Wise*, 71 Md. 43, 18 Atl. 31, the Court of Appeals of Maryland held, in

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an action for damages caused by the washing away of a bridge alleged to have been unskilfully built:

"It is competent to allow a witness to testify, from his knowledge of the stream, extending back" over a number of years, "whether the width of the span and the height of the bridge were sufficient to enable the water to pass."

But no ruling on this subject is, in my judgment, any stronger than that found in the decision of this court in the case of *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124. That was a case almost identical to the one at bar. Respondent herein was also respondent therein. And the rule asserted in that case is that the observations, judgment, and opinions of witnesses acquainted with the premises as to the cause of the overflow were as certain and direct as the measurements that were taken upon the ground. The rule asserted by this court in *McLeod v. Lee*, *supra*, is cited by Mr. Rogers in his work on Expert Testimony in support of the assertion that the opinions of ordinary nonexpert witnesses may be received on the question of what was the possible cause of a given effect. (Rogers on Expert Testimony, 2d ed. p. 15.) The assertion of this court in the case of *McLeod v. Lee*, *supra*, is no less emphatic upon the point in question than is that of many other jurisdictions, to wit: *Clinton v. Howard*, 42 Conn. 294; *Indianapolis Street Ry. Co. v. Robinson*, 157 Ind. 414, 61 N. E. 936; *Barry v. Farmers' Mutual Ins. Assn.*, 110 Iowa, 433, 81 N. W. 690; *Laird v. Snyder*, 59 Mich. 404, 26 N. W. 654; *Ohio R. Co. v. Long*, 52 Ill. App. 570; *White v. Farmers' Mutual Fire Ins. Co.*, 97 Mo. App. 590, 71 S. W. 707; *Dwyer v. Buffalo General Electric Co.*, 20 App. Div. 124, 46 N. Y. Supp. 874; *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. C. 445, 35 S. E. 745; *Texas & P. Ry. Co. v. Wooldridge* (Tex. Civ. App.) 63 S. W. 905; *Union Pacific R. Co. v. Gilland*, 4 Wyo. 395, 34 Pac. 953; *St. Louis & S. F. Ry. Co. v. Bradley*, 54 Fed. 630, 4 C. C. A. 528.

The prevailing opinion assumes to assert that there could be no liability in damages in this case, even assuming that the dam could cause the deposition of sand in

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the bed of a river above the highest point of backwater, for the reason that dams in river channels are essential to irrigation in this state, and that the law recognizes irrigation not only as lawful, but as especially favored, and that damage caused otherwise than by direct overflow is such a consequential damage that no liability in the law exists therefor.

If this assertion had any foundation either in custom or law, it would be inapplicable here. The dam in question here was not essential to the ditch, in so far as the original purpose of that waterway was concerned. The dam was only essential to the forced, unusual, and, if I read the record aright, unreasonable use to which the Spragg, Alcorn & Bewley ditch was put. In this I have reference to the fact, as disclosed by the record, that three dams were thrown across the Spragg, Alcorn & Bewley ditch to force the water out of that ditch into branch ditches constructed to cover higher lands, and I have reference to the further fact, as disclosed by the record, that the ditch which was five feet deep at its construction was, by reason of the new use to which it was forced, filled up with sediment and sand and debris until it was little more than half of its original dimension. The Spragg, Alcorn & Bewley dam, according to the record, was constructed, not for the purpose of forcing water into the Spragg, Alcorn & Bewley ditch, for that was unnecessary, inasmuch as the ditch originally took water from the river without a dam, but the dam was constructed to overcome the effect of the filling up of the ditch, brought about by the obstructions thrown across it and the new, unnatural use which it was made to serve.

Mr. Farnham, in his work on Waters and Water Rights (vol. 2, sec. 551), says:

"An action will lie for penning backwater, as soon as it interferes with a use to which the upper proprietor attempts to put his land, although he was not making such use of the land when the dam was built. In order to give the upper owner a right of action the water must

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be set back over his line, because neither the erection of a dam nor the ponding of the water is a nuisance *per se*. So, it is not the erection of the dam which gives the right of action, but the subsequent use of it in case it throws the water across the line."

The prevailing opinion in this case, in my judgment, is based upon a false conception of the testimony and the record as it is presented to this court. The Spragg, Alcorn & Bewley ditch was originally constructed to lead from the river into what became known as the Spragg, Alcorn & Bewley slough, sometimes called the Mason slough. The latter was utilized as a ditch by the original constructors. Spragg, who originally constructed the ditch, testified that at the time of the construction of his ditch the banks of the river at the intake of the ditch were approximately seven to seven and one-half feet. He testified that it required no dam to force the water from the Walker River into the ditch. He testified that so great was the flow of water through the ditch thereafter that it caused him to be apprehensive lest it should injure parties who lived below.

The testimony of Harry Warren is to the effect that three separate dams had been thrown across the Spragg, Alcorn & Bewley ditch for the purpose of supplying water to three separate branch ditches, each one of which took the water at the height of its respective dam; the object of this being to cover higher lands. These dams maintained in the Spragg, Alcorn & Bewley ditch raised the level of the water in that ditch and so forced it back as to make it necessary to continuously raise the Spragg, Alcorn & Bewley dam in the river.

The witness Harry Warren testified that in 1904 and 1905 the Spragg, Alcorn & Bewley dam had been so raised and enlarged that the water flowing over the dam had a drop of between six and seven feet. The witness was interrogated and testified:

"Q. Can you describe the difference in the condition of the river between the Spragg, Alcorn & Bewley dam and

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the head of the Merritt ditch in 1904, and when you saw it in the years preceding—say fourteen years back? A. It was filled up an average of three feet, I think.

"Q. In 1904 was there any difference in the river above and just below the Spragg, Alcorn & Bewley ditch? A. It was higher above than it used to be in the earlier days, owing to the bottom being filled up.

"Q. What do you mean by higher; the sand in the river, or the water? A. The sand bar was higher above than below. The sand was three feet higher than below.

"Q. Then the water is level across that dam and had a drop of three feet just over the dam? A. Had a drop of between six and seven feet.

"Mr. Treadwell—In 1904? A. Yes, in 1903.

"Q. How was that in 1905? A. It was very near the same, only the drop of the dam washed off a little bit.

"Q. Now in 1904, at the time you bulkheaded the Merritt ditch, did you notice how much farther up the stream this filling of sand had gone? A. Clear up above the Merritt ditch, filled up so much made it fall from the river into the Merritt ditch. We would say among ourselves, the high water would come again.

"Q. To fall from where into the Merritt ditch? A. From the river, the bottom of the river.

"Q. Then the sand had filled in so much that the bed of the river was raised above the head of the Merritt ditch? A. Quite a fall. We could have taken the dam out at the Merritt ditch, and it would have taken the river at that time."

The Merritt dam, upon which stress is laid in the prevailing opinion as having been an agency in contributing to the flooding of the premises of respondent, was originally but eighteen inches high. It was covered over with the sand that extended upstream from the Spragg, Alcorn & Bewley dam as early as 1884. It was never used as a dam after that date. As early as 1885, it was covered three feet deep with the sand that extended from the Spragg, Alcorn & Bewley dam. The banks of the river in the vicinity of the Merritt dam, which were

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originally approximately seven feet high, were in 1904 but three feet high. These facts are set forth in the record from the testimony of Feigenspan, Warren, McLeod, Waldo, and many others, and these facts are supported by the measurements taken by the respective engineers who testified in the case. May we not question how could the Merritt dam, covered over by a deposit of sand and sediment to a depth of three feet as early as 1885, have affected the flow of the stream in 1904? One other pertinent question appeals to us from the record, in view of the position taken in the prevailing opinion. Could the Merritt dam, that had passed out of existence as early as 1884, have caused the deposit of silt and sediment below or downstream from the place where it once existed? And if this must be answered in the negative, then another question appears to me to be pertinent: What caused the filling in of the bed of the stream to a depth of approximately three feet downstream from the Merritt dam that had gone out of existence, and between the place where it once existed and the Spragg, Alcorn & Bewley dam?

Let us apply the doctrine of physical impossibility, the keynote of the prevailing opinion, to that section of the bed of the river between the place where the Merritt dam once existed and the Spragg, Alcorn & Bewley dam, and let us take the assertions relied upon as facts in the prevailing opinion. The prevailing opinion assumes the distance between the Spragg, Alcorn & Bewley dam and the Merritt dam to be 4,000 feet. The prevailing opinion assumes the height of the Spragg, Alcorn & Bewley dam to be three and one-half feet. The prevailing opinion assumes the grade of the river between these two points to be one foot to every thousand linear feet. The conclusion reached from these assumed facts is that the Spragg, Alcorn & Bewley dam could not affect the flow of the stream to a point farther up than 3,500 feet. What caused the filling in of the channel of the stream for the other 500 feet? The rule relied upon in the prevailing opinion asserts that it was a physical impossibility

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for the Spragg, Alcorn & Bewley dam to accomplish this, and yet the record discloses that the entire distance between the two dams, or between where the Spragg, Alcorn & Bewley dam actually existed, and where the Merritt dam once existed, was filled in and the bed of the river raised approximately three feet for the entire distance. It was so filled in both above and below the place where the Merritt dam once existed that the Merritt dam itself was covered to a depth of three feet. Our effort in this respect, however, is lost, in view of the fact that the distances, dimensions, and grades asserted in the prevailing opinion are, as I view it, unsupported by the record.

The prevailing opinion lays some stress on the fact that the water which flooded the premises of respondent flowed back into the river some distance above the Spragg, Alcorn & Bewley dam. This is relied upon as a fact tending to disprove the effect of the Spragg, Alcorn & Bewley dam on the river at the point where the water broke from the river channel. It requires but a reading of the record in this case to account for this. The record discloses that measurements and elevations taken establish that in many places upstream from the Spragg, Alcorn & Bewley dam the banks of the river were not flooded by the overflow in the years complained of, while portions of the premises remote from the river were covered with water. This was due to the fact that the banks of the river were higher than great portions of the surrounding country. Moreover, it requires but a reading of the transcript in this case, and in fact a reading of the briefs of appellants, to ascertain the fact, as established by measurements and levels taken, that for some distance above the place where the Spragg, Alcorn & Bewley dam is situated the banks of the river, as well as portions of the surrounding territory, are higher than the flooded portions of respondent's premises, and higher than the greatest elevation reached by the flood waters.

The prevailing opinion makes the assertion that the Spragg, Alcorn & Bewley dam was, prior to 1903, never

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more than four feet high, and at no subsequent time over five feet high. Unless we are to accept the testimony of one witness as against that of another, I am unable to see how this court can adopt this assertion. The bank of the river at the place where the Spragg, Alcorn & Bewley dam was located was, prior to the construction of the dam, according to nearly all the witnesses, at least seven feet high. The witness Nichol testified that between 1885 and 1896 the dam was from one and one-half feet to two feet below the banks of the river, from which it follows that the dam was at least five feet high. The witness Plummer testified that the dam was about two or two and one-half feet below the banks of the river in 1899, resulting in the conclusion that the dam was then four and one-half feet high. The witness Gifford, manager of the Miller & Lux properties and foreman and manager of the Miller & Lux interests in the Spragg, Alcorn & Bewley ditch and dam, testified that up to 1903 the dam was two and one-half feet below the banks of the river, resulting in the conclusion that the dam was at least four and one-half feet high at that time. The witness Spragg testified that in 1867, when he disposed of the Spragg, Alcorn & Bewley ditch, it was five feet deep at its intake; that the bottom of the ditch was above the bed of the river; and that at the intake of the ditch there was a deep hole in the bed of the river.

The witness Waldo testified, corroborating the statements of Spragg as to the original depth of the ditch, and further testified that at the intake the bed of the river was about four feet below the bottom of the ditch. This testimony would warrant the conclusion that at the time when these witnesses were interested in the Spragg, Alcorn & Bewley ditch, and before the construction of the dam, the distance from the bottom of the river to the top of the bank was approximately nine feet. Applying to this the testimony of Gifford, manager for the appellant companies, that in 1903 the dam was two and one-half feet below the banks of the river, it amounts to but a simple matter of deduction that from the bottom

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of the river, as it was at the time of the first construction of the dam, to the top of the dam, as it was in 1903, was approximately six and one-half feet. This is further supported by the testimony of Warren, wherein he stated that the water in 1903 had a drop over the dam of between six and seven feet.

The prevailing opinion states:

"The upper point of overflow, which is alleged to have caused considerable damage, was over two miles up the river from the Spragg, Alcorn & Bewley dam. The fall in the river is about one foot to the thousand, which would make the bed of the river at the Spragg, Alcorn & Bewley dam about ten and one-half feet lower than the upper point of overflow."

The witness Charles McLeod testified that the first overflow in 1904 was in June of that year, and was about 300 or 400 feet above the Perazzo cut, indicating that it was between stations 38 and 39 on respondent's Exhibit 1. This point, at most, could have been but a trifle over 4,500 feet from the Spragg, Alcorn & Bewley dam. The witness McLeod testified that this was the most remote point of overflow from the Spragg, Alcorn & Bewley dam in 1904.

The testimony of the witness Charles McLeod further establishes the fact that at the same time there was a break in the river bank and an overflow at or about the mouth of the crosscut indicated on respondent's Exhibit 1, this point being less than 2,000 feet upstream from the Spragg, Alcorn & Bewley dam and between the Spragg, Alcorn & Bewley dam and the Merritt dam; and I may observe parenthetically at this point that the Merritt dam could have had no effect upon this latter overflow. This observation I make in view of the position taken in the prevailing opinion that the Merritt dam may have contributed to the injury of respondent. It is hardly necessary for me to emphasize the fact that the Merritt dam could have contributed no part toward overflow that occurred between the position that it had formerly occupied and the Spragg, Alcorn & Bewley dam; nor need I

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emphasize the further fact that the theory of physical impossibility could not relieve the Spragg, Alcorn & Bewley dam of the responsibility for this overflow. This flood covered a great portion of the McLeod ranch and practically destroyed the crops for that year.

In view of the record presented to this court, I am unable to see how the prevailing opinion can support the several assertions of fact relied upon therein for the several conclusions reached.

Summed down to its last analysis, this case presents physical conditions undeniable:

First—The premises of Angus McLeod, the respondent, were flooded by the overflow waters of the Walker River. Minor floods had taken place in years past, but the floods of 1904, 1905, 1906, and 1907 were such that they destroyed great tracts of cultivated land and covered other portions with sand and sediment.

Second—The bed of the Walker River had been filled in with sand and sediment from the Spragg, Alcorn & Bewley dam upstream to and beyond the point where the river broke from its banks and destroyed the premises of respondent. So great was the amount of the filling that at the intake of other ditches several thousand feet upstream it became necessary to build dams across the mouth thereof, to prevent the entire river from flowing through. Other dams that had been in existence in the river were entirely covered up with the sand and sedimentary deposit extending from the Spragg, Alcorn & Bewley dam upstream. From the Spragg, Alcorn & Bewley dam, and extending to and beyond a point where the greatest volume of water broke from the river banks, islands and bars had formed in the channel. Downstream from the Spragg, Alcorn & Bewley dam there was no filling in of the bed of the stream, no islands or other bodies in the channel, at least until after 1905 when the top of the Spragg, Alcorn & Bewley dam was washed off.

Third—The Spragg, Alcorn & Bewley dam had been continually enlarged to meet the increased demand for water through the Spragg, Alcorn & Bewley ditch. Three

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dams had been thrown across the Spragg, Alcorn & Bewley ditch to force water into the several branch ditches. The ditch itself had been allowed to fill with sediment. All of which required the raising and enlarging of the main dam (the Spragg, Alcorn & Bewley dam) in the river.

Scientific experts, after viewing the premises, the dam, the river, and its surroundings, long subsequent to the flood, say that it was a physical impossibility for the Spragg, Alcorn & Bewley dam to have caused the flooding of respondent's premises. Scientific experts, viewing the premises, say that by reason of a rule known to hydraulics it was impossible for the Spragg, Alcorn & Bewley dam to have affected the flow of the stream or caused the deposit of sediment to a greater distance than to a point where a horizontal line drawn across the crest of the obstruction would intersect the bed of the stream. Yet, in the face of this testimony, we have the physical facts, the physical presence of the filling up of the bed of the stream, of the formation of bars and islands extending all the way from the Spragg, Alcorn & Bewley dam many thousands of feet farther upstream than this theoretical point of intersection. The flooded area covering the premises of respondent extended upstream from the Spragg, Alcorn & Bewley dam, and there was no flooded area, so far as the record discloses, below this obstruction.

Many other witnesses, laymen who were on the ground and in the vicinity at the time of the flood and for many years previous to it, who had opportunity to see and observe the Walker River at the time of the floods complained of, opportunity to see and observe the premises of respondent at the time of the floods complained of, at the time at which these premises were inundated—these witnesses, basing their testimony on no theory, but upon what they actually observed, testified not only as to what they saw with reference to the action of the river and the condition of the Spragg, Alcorn & Bewley dam, but from their experiences and observations extending through years, and in some instances through an

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entire lifetime, told of the cause which wrought the destruction of respondent's farm. They gave their personal observations. They related physical conditions actually observed by them. They said it was the Spragg, Alcorn & Bewley dam. The jury impaneled to try the case, after listening to these two conflicting lines of testimony, and after visiting the premises themselves, rendered a verdict which by its general terms found the flooding of the premises of respondent to be due to the filling in of the original bed of the stream, caused by the Spragg, Alcorn & Bewley dam.

The position taken by my learned associates in this case in the prevailing opinion, as well as in the concurring opinion of Mr. Chief Justice NORCROSS, is in the first instance and primarily based upon scientific theories. They lay aside proven physical facts and accept what they term to be a "law of hydraulics." Things positive are laid aside for things conjectural.

I know of no language more expressive of my views of this case than that asserted by the Supreme Court of Pennsylvania in the case of *Brown v. Bush*, *supra*, wherein that court, supported in its position by many authorities which I have taken occasion to cite, says:

"We do not undervalue scientific measurements, but the history of all engineering in Pennsylvania has shown that, whenever science has disregarded and set aside the testimony of local experience and observation, it has blundered, and has had to do its work over again. Its conclusions may be fortified by the nicest experiments and the minutest calculations, but there are the fallibility of instruments, the unsteadiness of the hand or eye that uses them, the carelessness of assistants, and other causes which affect the results. And then Nature has her own secrets, which she has not revealed, even to science. Who can calculate for what the watermen call 'piling' of water; or for the effect of removing a given obstruction a few rods farther downstream, whereby the velocity of the current at a particular point is changed; or for atmospheric resistance to water? The question of fact in this

case was a very close one. No doubt the leveling was well done, but if in spite of it the water would make other marks than it did when obstructed only by the stone row, it was a telltale that could not be contradicted."

In the face of the record presented in this case, I am unable to close my eyes to the facts presented by the physical conditions found to be in actual existence, and adopt a theory which says it is a physical impossibility for these proven physical conditions to exist. I am unable to accept a theory which, even if certain, would in this case be inapplicable, and reject established facts.

ON REHEARING

By the Court, COLEMAN, J.:

Since this case was formerly before us, Angus McLeod has died, and on motion Mason E. McLeod and Charles A. McLeod, executors of his last will and testament, have been substituted.

When this case was before us originally, we did not consider the assignment of error relied upon by appellants which goes to the alleged erroneous ruling of the court upon the motion for a change of venue, for the reason that as we were of the opinion that the judgment should be reversed for other reasons, we did not think it necessary to consider that assignment, in view of the probable change of conditions in the county of the trial subsequent to the date of the former trial in the district court, and especially since, under the law as it now stands, an appeal can be taken directly from an order denying such a motion. We see no reason to change our position on this question at this time, and merely allude to it now because of the earnestness with which the assignment was urged upon us upon the argument on rehearing.

Before entering upon a consideration of what we deem to be the serious question in this case, we desire to dispose of one point presented by the respondents in their petition for rehearing and in the argument on rehearing,

and that is that in the original decision reversing the judgment we ignored the long line of decisions of this court holding that the supreme court will not disturb the verdict of a jury when there is a substantial conflict in the evidence. As to the general proposition of law contended for by counsel for respondents, there can be no question. But it seems to us that where the findings of the lower court are based upon incompetent evidence, admitted over the objection of the adverse party, to which exceptions were taken, and which admissions of evidence are assigned as error and relied upon in the appellate court, where it is held that the evidence was erroneously admitted, the contention must fall. Such was the theory upon which the court proceeded in the original decision herein, and we think the views then entertained are sound. The point most strenuously urged upon the rehearing is that the court took the wrong view of the law upon the question as to the competency of the evidence given by witnesses which was termed nonexpert. It was said by counsel for respondents that the views of the court as expressed on this question are contrary to all authority upon the question, and that "the decision in this case is an unquestionable reversal of the rules applied in the former decision of this court in *McLeod v. Lee*, 17 Nev. 103." We are forced to take issue with the contention of counsel. We did not undertake to distinguish the *McLeod-Lee* case in our former opinion, for the reason that we thought a mere perusal of it would convince any one of its nonapplicability to the situation here presented. But in view of the contention of counsel, we will point out wherein it is of no force in reaching a conclusion in this case upon the question of the competency of the nonexpert testimony admitted in the case. What was said in the *McLeod-Lee* case that could have any possible bearing upon the question involved will be found on pages 122 and 123, from which we quote:

"The testimony as to the character of the measurements taken is thus given by the defendant Lee. In

reply to the question, 'What was the difference in the level of the water above and below the dam?' he said: 'By an actual level made there, about sixty feet below the dam to sixty or eighty feet above, was eight inches and a half. I took the level with a spirit level and square. I waded out in the water up to my knees, and put the stakes down until I shoved them down with a level above; found it was correct, and called the attention of four or five persons present.'

"This witness also testified that he sailed over the dam in a flat boat, with a pole eight or ten feet long, and did not upset. 'When I got under the willows * * * I put down the pole as far as I could, but could not find any bottom in the current of the stream.'

"The character of the measurements, taken, as they were, with a spirit level and square, in the river, amidst the eddying tide of the water and the drifting currents of the sand, could not, it seems to us, be any more certain or direct than the observations, judgments, and opinions of witnesses who were well acquainted with the premises."

"Upon examination of all the evidence we think the plaintiff's witnesses testified as positively, direct, and certain as to the cause of the overflow as the witnesses on the part of defendants.

"There being a conflict of evidence, we cannot disturb the decision upon this ground."

It does not appear from the opinion that any objection was made to the testimony of the witnesses who gave their opinions as to the cause of the overflow, consequently the same question was not presented to the court in that case which we are called upon to determine, and it will be seen from that portion of the opinion quoted that the court did not put its stamp of approval upon the opinion evidence given in that case. About all it held was that as between what it probably thought unsatisfactory evidence given on both sides of the case, it would not disturb the verdict of the jury.

Another feature of that case, which robs it of all

semblance of authority for our guidance in the case at bar, is that the facts in that case presented an entirely different situation from that presented for our consideration. So far as can be gathered from a reading of the opinion, the point of overflow which was the basis of the action in that case was not more than sixty to eighty feet above the dam, while in the case at bar the point of overflow which did the most damage was two miles above the dam. There was no dam between the dam which caused the overflow in that case and the point of overflow, there were no cuts and ditches to be taken into consideration, as in the case at bar. Furthermore, a man could have stood at the dam in question in that case, and so far as appears from the opinion, have seen with his naked eye the backwater therefrom going out of the banks of the river sixty or eighty feet above. Surely no one would say that the situation there presented was in the least similar to the situation in the case at bar. In that case any person could have seen with the naked eye the direct effect of the dam in causing backwater to overflow the land.

Another distinguishing feature, and the most serious one, is that in that case nothing was claimed as a consequence of the deposit of sand in the stream, while in this case the entire reliance of plaintiff is based upon the deposit of sand far above the point where a line drawn from the crest of the water as it goes over the dam intersects the bed of the stream.

In the light of these distinguishing features, how can it be said that the McLeod-Lee case is authority in the case at bar, or of the least assistance to us in solving the question under consideration?

We will now take up the other cases relied upon by counsel, and undertake to show wherein they are dissimilar from the case at bar; and in this connection it must be kept in mind at all times that there are certain facts and circumstances which make this case dissimilar from any of the cases mentioned, viz., the existence of the Merritt dam between the Spragg, Alcorn & Bewley

dam and the points of overflow complained of, the making by plaintiff of the several cuts between the dams in question and the point of overflow chiefly complained of, and the cutting of the Perazzo ditch.

Of the cases cited, the one which approaches more nearly the case at bar is that of *Hand v. Catawba*, 90 S. C. 267, 73 S. E. 187; but in that case there was no dam above the dam alleged to have been the cause of the damage complained of; there were no fresh cuts made by the plaintiff, as in the case at bar; there was no ditch corresponding to the Perazzo ditch in the case now under consideration. While the fall of the river in that case is not given, it is apparent that it was very slight.

The case of *Allen v. Thornapple*, 144 Mich. 370, 108 N. W. 79, 115 Am. St. Rep. 453, cited by respondents, was one in which suit was brought to recover for damages caused by backwater from a dam. So far as appears, there was no controversy as to the competency of expert or nonexpert testimony. It does not aid in determining the question here. The same may be said of *Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243. The case of *Brown v. Bush*, 45 Pa. 61, is one in which the facts were so dissimilar from the one at bar as to rob it of all value in assisting us in the present case. In that case the dam was only 100 feet below plaintiff's property. It was not a case in which the deposit of sand caused an overflow two miles above the dam, as in the case at bar, but was a case where one standing at the dam could plainly see with the naked eye the effect of the dam upon the water.

As to the case of *Treat v. Bates*, 27 Mich. 390, all that need be said is that it was not a case where it was contended that a deposit of sand was caused, as in this case, nor are the distances nor the fall of the river nor the height of the dam given. In short, no data is given upon which a comparison can be made to the case at bar.

Respondents complain bitterly of the position taken by this court in the former opinion in its holding in

regard to the testimony given as to a statement alleged to have been made by N. H. A. Mason, as follows:

"If they keep building that dam up, some day it is going to ruin your place."

Counsel say:

"It is strange that the court found no evidence in the record to sustain the contention that Mr. N. H. A. Mason was the predecessor in interest of defendants, Miller & Lux and Pacific Livestock Company."

Again counsel are mistaken. We knew full well when then considering the case that the evidence shows that Mason was the predecessor in interest of appellants Miller & Lux and Pacific Livestock Company. That was an admitted fact. If counsel will only read our opinion, they will see that we did not question Mason's prior ownership. What we did say was that there was no evidence in the record that Mason owned the property "at the time it is alleged he made the statement." The very language attributed to Mason, especially the word "they," indicates that if he did use the language claimed, it was some time after he parted with the title to the property.

Counsel for respondents complain also of our holding in the former opinion as to the proper method of proving the damages alleged to have been sustained by the respondents. We want to say that on this question the authorities are divided, and it is possible that we would not have reversed the judgment because of the method of proving the damages alleged to have been sustained, but in finding it necessary to reverse the judgment for other reasons, we thought it best to lay down what we believe to be the safer rule. And while we do not intend to elaborate upon this question, we will quote from Jones on Evidence, sec. 388, pocket ed., as follows:

"The question of damages is often so intimately connected with that of the value of property that it becomes necessary to consider whether expert witnesses may ever give their opinions as to the damages which a party has suffered in a given case. On a principle

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discussed in another section it is evident that, if the witness may give an opinion as to damages, the practice is an exception to general rules, since this is a question for the determination of the jury. Undoubtedly it is the general rule that witnesses cannot give their opinions as to the amount of damages suffered in a given case. But there is a class of cases in which there is a decided *conflict* of authority as to the admissibility of opinions as to the amount of damages in *condemnation proceedings*. The courts of many of the states, perhaps a majority, hold that in such cases witnesses cannot state the amount of damages sustained thereby, on the ground that the amount of damages is the very subject referred to the jury. These courts confine the witnesses to a statement of the value of the property *before* and *after* its condemnation." (See authorities cited.)

It is also urged that the former opinion was erroneous in holding that it was improper to permit the plaintiff to testify as to how much, on an average, he made on his entire ranch for five years before the alleged damages were sustained. Plaintiff's ranch contained 940 acres. Let us assume that 250 acres of the very poorest land owned by plaintiff was damaged, and that the remaining 690 acres was very fertile and produced enormous crops of great value, could it be said that the method sought to be adopted by plaintiff to prove his damage would be the correct one? We think not. This illustration may be overdrawn; in fact, we think that the land alleged to have been damaged was about the best owned by the plaintiff, but it serves to show why the contention of counsel is not sound. While under some circumstances it is possible that it might be proper to resort to the method alluded to for the purpose of proving the value of land, it was certainly not proper under the circumstances of this case.

The question in this case upon which all others turn is: Did the Spragg, Alcorn & Bewley dam cause a deposit of silt and debris in the bed of the Walker River so as to

produce the overflows complained of? In support of the contention of respondents, counsel presented an elaborate discourse on hydraulics, and diagrams prepared by an engineer. We have read and considered these with a great deal of interest. We think we can dispose of all that is said by the statement that the matter produced does not deal with situations similar to those at bar. The circumstances are so entirely at variance from the ones in the case under consideration that we receive no assistance from them in determining this case. But, to reiterate our former conclusion, no matter what view we reach as to the point where backwater from a dam will cause a deposit of sediment, there is one physical fact which cannot be ignored or disputed, and that is, if we concede all that is contended for by respondents as to the effect of a dam in causing the deposits of sediment and debris, there is no way of escaping the conclusion that if the Spragg, Alcorn & Bewley dam was causing a deposit above it, the very same process was going on above the Merritt dam, which was 4,000 feet upstream from the Spragg, Alcorn & Bewley dam. Of course, it is contended by respondents that the Merritt dam was washed out. True; but it was rebuilt immediately, and, so far as appears, was ever thereafter maintained, though it was so covered with sand that it was not seen after 1906. But when we bear in mind that the Merritt dam was at least eighteen inches in height, that it was 4,000 feet higher up the stream than the Spragg, Alcorn & Bewley dam, and that the river had a fall of about one foot to the thousand, it will be seen that the Spragg, Alcorn & Bewley dam had to be five and one-half feet in height (a height never claimed for it) before the backwater from it would reach the top of the Merritt dam. This is a law of physics that no evidence can overcome.

This opinion is to be read in connection with what was said in the original opinion.

It is ordered that the judgment and order appealed from be reversed.

Sanders, J., concurring

SANDERS, J., concurring:

I concur in the order of Justice COLEMAN.

I am of the opinion that it was prejudicial error on the part of the trial court to classify a number of witnesses, introduced on the part of respondent, as *experts* when no apparent reason or necessity existed therefor, other than to make it possible for these witnesses to give their opinion and state as an ultimate fact that appellants' dam caused the overflow. This was the primary and ultimate fact to be determined by the jury. It was a close and doubtful question, and in such situation it is not difficult to perceive the influence of such opinions and conclusions upon the mind of a juror called upon to determine a doubtful question. It is conceded that opinion evidence is justifiable in a proper case upon the broad ground of necessity, but, as I view the record, the subject-matter concerning which the witnesses in question were interrogated did not justify an expression of their opinion, judgment or conclusion upon the ground of necessity. In other words, these witnesses detailed, described, and laid before the jury, in a clear and intelligent manner, the facts concerning which they were interrogated, so that it was possible for the jury to draw its own inference and form an intelligent judgment as to the cause of the injury complained of. I am aware that the opinion of Judge Hawley, in the case of *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124, is cited by modern texts on evidence in support of the proposition that the opinion of an ordinary witness as to cause and effect is admissible (1 Elliott on Evidence, sec. 674), but I am of the opinion that this distinguished jurist did not commit himself nor the court to such a doctrine. The court in that case was dealing with an argument advanced as to the weight of the evidence. In the case at bar we are called upon to rule upon the admission of evidence over a proper objection. The witnesses who were permitted to state their opinions and conclusions as to the cause of the overflow had no difficulty in reproducing or describing to the jury the facts of the subject-matter concerning which they were interrogated,

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and I conclude that no such necessity existed as would warrant or justify the court in permitting these witnesses to express their opinions and conclusions as to an ultimate fact upon which the respondent rested his case.

I am further of the opinion that, in view of respondent's knowledge of the then existing conditions resulting from long-continued past conditions of the stream, the court erred in refusing to instruct the jury fairly and correctly on the law covering appellants' evidence adduced in support of their affirmative defense that respondent contributed to his own injury. (*Malmstrom v. People's Ditch Co.*, 32 Nev. 246, 107 Pac. 98, distinguishing *Shields v. Orr Ditch Co.*, 23 Nev. 354, 47 Pac. 194.)

I am also of the opinion that the damages are excessive.

MCCARRAN, C. J. dissenting:

I dissent.

In my judgment, there was nothing presented in the reargument which in any wise attempted to meet the various phases of the case discussed in my former dissenting opinion (40 Nev. 487, 153 Pac. 574). There I dwelt at length on the question of the admissibility of the so-called nonexpert testimony.

I am now forced to the belief that the learned justice who wrote the prevailing opinion here failed to grasp the full force and significance of the language of this court in the case of *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124. Moreover, it is manifest that the long and eminent line of authority supporting my position in my dissenting opinion and supporting this court in its decision in *McLeod v. Lee*, *supra*, has been lost sight of.

How different from the prevailing opinion is the application of the rule laid down in *McLeod v. Lee*, where the same is cited without comment by Mr. Rogers in his work on the Law of Expert Testimony. (Rogers on Expert Testimony, 2d ed. p. 15.)

In my judgment the conclusion reached in the prevailing opinion here, as in the prevailing opinion on the former hearing, is not supported by the record as it is before us.

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In the prevailing opinion much stress is laid on the effect of the so-called Merritt dam, an obstruction in the stream some distance above the Spragg, Alcorn & Bewley dam. This obstruction, according to the record, was in the beginning about eighteen inches high. As early as 1884 the bed of the stream had become so filled with sand and sediment from the Spragg, Alcorn & Bewley dam that the Merritt dam was entirely obscured. The record negatives any idea of the Merritt dam having ever been used as a dam after the year 1884. The record discloses that in 1885 it was covered three feet deep with sand. So extensive was this deposit above the Spragg, Alcorn & Bewley dam that the banks of the river in the vicinity of the Merritt dam, which were originally approximately seven feet high above the floor of the river, were by the year 1904 not to exceed three feet high above the newly established bed of the stream. It requires but a reading of the testimony of Feigenspan, Waldo, McLeod, and Warren to determine these facts. Never after 1885, if the record is to be relied upon, could the Merritt dam have become an obstruction to any extent whatever. Never after that date could it have had any effect on the flow of the stream or in the way of obstructing sand or sediment or debris. I am at a loss to know how a foreign body buried three feet below the bed of the stream could affect the flow of water in that stream. The floor of the stream, as it originally existed, had been entirely covered by silt and sand to a depth of four feet, which covering, according to the record, extended from the Spragg, Alcorn & Bewley dam upstream far above and beyond the Merritt dam as it originally existed.

Whatever may be said as to the acts of respondent in making those certain cuts by reason of which it is contended he contributed to his own injury, some physical facts stand out unanswered. The Spragg, Alcorn & Bewley dam marked the lower terminus, so to speak, of the sand deposit. This deposit had grown from year to year as the Spragg, Alcorn & Bewley dam was extended in height. The Spragg, Alcorn & Bewley dam was raised

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from year to year as new and higher lands under the Spragg, Alcorn & Bewley ditch were forced into cultivation. The record establishes that there was no deposit of sand below the Spragg, Alcorn & Bewley dam. The record establishes that the deposit of sand and silt in the bed of the stream above the Spragg, Alcorn & Bewley dam had commenced long prior to the construction of the cuts made by the respondent. I am at a loss to know how these cuts could have contributed to the injury of respondent, which injury was caused by the filling up of the bed of the stream, when a part of that filling up had taken place long prior to the creation of the cuts themselves. It was not the Spragg, Alcorn & Bewley dam alone which created the overflow of the lands of respondent. The record establishes that that overflow was caused by the filling up of the bed of the stream by deposits of sand and silt, which deposits were caused by the Spragg, Alcorn & Bewley dam. The record establishes that many of these deposits, and indeed much of the filling of the bed of the stream, were in existence long prior to the time at which it appears the respondent created the cuts by reason of which it is contended he contributed to his own injury.

Assuming for the sake of argument that all that is contended for with reference to the Merritt dam were true, and that it was a contributing cause, the prevailing opinion, in so far as it deals with this phase of the case, is antagonistic to a principle of law so well established as to be considered ruling. Mr. Farnham in his work on Water and Water Rights, vol. 2, p. 1892, puts the proposition thus:

"The owner of the obstruction cannot, however, escape all liability on the ground that other obstructions contributed to the injury, if his own did so, and if his own act was an efficient cause of the injury."

And the learned author cites the leading case of *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401, in support of the proposition that:

"One who maintains booms in a river whereby the

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water is set back upon the land of an upper riparian owner is liable for the resulting injury, although logs other than his own are stopped by the booms, and form the jams which raise the water, or even where the rise is caused by flood trash."

The concurring opinion of Mr. Justice SANDERS presents three statements novel and revolutionary. To my mind it is a lack of familiarity with the record which causes the learned justice to say that the trial court classified witnesses as experts—"for no apparent reason other than to make it possible for such witnesses to state their opinion and conclusion as an ultimate fact that appellant's dam was the sole cause of the injury."

The learned justice apparently overlooked the fact that at the instance and request of the defendant the court gave the following instruction:

"You are instructed that any witness, whether for plaintiff or defendant, who testified as to his opinion as to what caused the overflow of plaintiff's land, whether he formed that opinion upon investigation made before or after the overflow, or in any other manner, and whether engineer or not, comes within the definition of an expert referred to in these instructions, and his testimony as to such opinion was only admissible because such person was deemed by the court to have expert knowledge on that subject. Such expert testimony is to be construed by you in view of the ascertained facts and the known laws of nature, and you are not bound by the opinion of any witness of plaintiff or defendant if such opinion is contrary to the facts proved or to the known laws of nature."

Here was a specific request coming from the defendant in the way of an instruction allowed by the court, in which, at the instance of the defendant, any witness, "whether for plaintiff or defendant, who testified as to his opinion as to what caused the overflow of plaintiff's land, whether he formed that opinion upon investigation made before or after the overflow, or in any other manner," was to be considered by the jury as an expert.

I dwelt upon this phase of the case at length in my

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former dissenting opinion. The nonexpert witnesses who testified were in most instances, if not in every instance, citizens of the community who, living in the vicinity, experienced in the conditions there prevailing, actually observed the Walker River and the McLeod ranch during the period in which the latter was damaged by the overflowing of the former. It was not an approximation based on subsequent conditions to which those witnesses testified. It was the physical thing which they, present upon the premises, saw, each detail of which they related. If the assertion contained in the first proposition of the concurring opinion were to become the law, it would revolutionize a phase of the law of evidence which has received the sanction of authority such as is recognized wherever our system of jurisprudence prevails. (3 Wigmore on Evidence, sec. 823; *Bonato v. Peabody Coal Co.*, 248 Ill. 422, 94 N. E. 69.) As to whether the testimony of these witnesses was to go before the jury as the testimony of experts was a question largely in the discretion of the trial court, and the concurring opinion, like the prevailing opinion, fails to designate a single element or instance in which the trial court could be charged with abuse of discretion in this respect.

Any amount of authority might be cited to support the rule under which testimony such as that adduced from these witnesses was admissible, but the rule is so succinctly stated by Mr. Chief Justice Carter, speaking for the Supreme Court of the State of Illinois, in the case of *People v. Jennings*, 252 Ill. 534, 96 N. E. 1077, 37 L. R. A. n.s. 778, that I deem it sufficient to quote the same at length. The learned justice says:

"Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury. (1 Wharton on Criminal Evidence, 8th ed. sec. 459.) It has been said that a witness must not be examined in chief as to his belief or persuasion, but only as to his knowledge of the fact. 'As far

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as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is correct, as where a man believes a fact to be true merely because he has heard it said to be so; but with respect to persuasion or belief as founded on facts within the actual knowledge of the witness the position is not true."

Mr. Lawson, in his work on Expert and Opinion Evidence, page 460, says:

"The opinions of ordinary witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal, *e. g.*, questions relating to time, quantity, number, dimensions, height, speed, distance, or the like.

"The indications themselves ought to be proved; and it is quite true that the jury are authorized to draw their own deductions from them; but no witness can fully present the appearances as they were before his eyes; and to take the testimony of what he saw without his opinion would seldom prove fully satisfactory, and would often be misleading. * * *

"The general rule certainly is that witnesses are to testify to facts, and not to give their individual opinions. This rule, however, has its exceptions, some of which are as familiar and as well settled as the rule itself. When all the pertinent facts can be sufficiently detailed and described, and when the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. But cases occur where the affirmative of these propositions cannot be assumed. The facts are sometimes incapable of being presented with their proper force and significance to any but the observer himself, and it often happens that the triers are not qualified, from experience in the ordinary affairs of life, duly to appreciate all the material facts when proved. Under these circumstances, the opinions of witnesses must, of necessity, be received."

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As to the second proposition dealt with in the concurring opinion of Mr. Justice SANDERS, namely, the instruction given by the court dealing with the question of primary or proximate cause, I deem it a useless expenditure of time and space to cite authorities supporting the instruction as given. Suffice it to say that it has been sanctioned by this court. (*Konig v. N. C. O. Ry.*, 36 Nev. 181.)

The court gave ample instruction as to the issue of respondent's acts contributing to the injury. Instruction No. 19, given in behalf of the defendants was a clear and explicit statement directing the jury that—

"If there is no evidence sufficient to show to your satisfaction whether the injury was occasioned by reason of the defendant's dam or some other cause, then you cannot speculate or guess at the matter, but in the absence of any proof satisfying you as to the actual cause of the injury you cannot render a verdict for plaintiff in this case, but must decide for defendants."

Again, defendants' Instruction No. 23, given by the court, was one which clearly instructed the jury as to contributing causes.

Again, Instruction No. 33 dwelt specifically upon the acts of respondent in making the cuts alleged by the appellant to have contributed to the injury. The jury was there instructed that if they found that the acts of respondent in this respect contribute to his injury, they should find a verdict in favor of defendant.

In instructing juries as to the law applicable to a given case it is not, in my judgment, the duty of the court to give every instruction offered by the respective parties. If one instruction clearly and specifically covers the particular phase of the law applicable to some issue in the case, it is sufficient. Experience has taught that it is not as a rule the lack of instruction which tends to lead a jury astray, but rather the giving of promiscuous, disconnected, contradictory instruction, the volume and extent of which usually amount to a labyrinth in which the jury may become lost.

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As to the third proposition relied upon in the concurring opinion, assuming for the sake of argument that the damages were excessive, such would be no ground for peremptory reversal by this court, inasmuch as it is within the province of this court, under its jurisdictional authority, to modify such damages. (*Konig v. N. C. O. Ry., supra.*)

Let us assume that every element relied upon in the opinion of my learned associates was well taken. Let me ask: What was the *efficient cause* of the flooding of the lands of respondent?

The history of the Spragg, Alcorn & Bewley dam, as it is related in the record, answers this question. This obstruction in the Walker River had originally served the purpose intended by the original owners of the Spragg, Alcorn & Bewley ditch, namely, to divert the water for the Spragg, Alcorn & Bewley ditch as originally constructed. But the Spragg, Alcorn & Bewley ditch was put into forced service, so to speak, in later years, and lands which were not originally under the ditch were brought under by raising the level of the water in the ditch and throwing a series of dams across the same. To do this, the Spragg, Alcorn & Bewley dam was raised each season and hence made to perform a service unusual, unanticipated, and the effect of which could not be foreseen. In this forced and unusual service, in this new and changing condition of the dam, was the efficient cause of the flooding. The act of forcing the obstruction to perform this unusual and changing service was the efficient cause of the flooding, hence the efficient cause of the injury of respondent, the liability for which, in the language of Mr. Farnham, *supra*, the appellant should not escape. This condition, evidence supporting it, and everything pertaining to it, was brought to the attention of the jury and the whole matter presented under most elaborate instructions as to every phase of the law pertaining to the case. Under a long line of decisions by this court, the verdict of that jury, based as it was upon

Points decided

a conflict of evidence, should not be disturbed by this court.

I refer again most emphatically to the matters dwelt upon in my former dissenting opinion, the assertions here made being only supplemental thereto.

[No. 2293]

CITY OF RENO (A MUNICIPAL CORPORATION), PETITIONER, v. C. H. STODDARD, AS EX OFFICIO CITY AUDITOR OF THE CITY OF RENO, AND D. W. DUNKLE, AS EX OFFICIO CITY TREASURER OF THE CITY OF RENO, RESPONDENTS.

[107 Pac. 317]

1. MUNICIPAL CORPORATIONS—NATURE OF POWERS—CONTROL BY LEGISLATURE.

Cities are mere instrumentalities of the state for the convenient administration of government, and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature.

2. MUNICIPAL CORPORATIONS—FUNDS—CONTROL BY LEGISLATURE.

The revenues of a city raised by taxation, though levied for specific public purposes, may be applied by the legislature to other municipal uses, subject to constitutional limitations.

3. MUNICIPAL CORPORATIONS—REPEAL—OMISSION IN AMENDING ACT.

Stats. 1915, c. 184, sec. 5, amending charter of city of Reno of March 16, 1903 (Stats. 1903, c. 102, as amended by Stats. 1905, c. 71) art. 12, sec. 10, by empowering the city council to levy and collect for general purposes a certain tax on the assessed value of real and personal property, 15 per cent of which should be set aside in a special fund to provide for a sewage-disposal plant or system for the city, was, as to such special fund, repealed by Stats. 1917, c. 76, amending section 5 "to read as follows," and omitting the provision for such special fund.

4. MUNICIPAL CORPORATIONS—SPECIAL FUND—REPEAL OF STATUTE—EFFECT.

The provision of the last amendatory act that all moneys held in any special fund might be transferred to the city's general fund authorized the transfer of the special sewage-disposal fund created by Stats. 1915, c. 184, sec. 5, to the city's general fund.

5. CONSTITUTIONAL LAW—MOTIVE OR POLICY OF LEGISLATURE—POWER OF COURT.

The motives of the legislature are not subject to judicial inquiry, and its will is above the judgment of the courts as to the wisdom or policy of legislation.

Argument for Petitioner

ORIGINAL PROCEEDING in *mandamus* by the City of Reno against C. H. Stoddard, as ex officio City Auditor, and D. W. Dunkle, as ex officio City Treasurer, of the City of Reno. **Writ granted** (McCARRAN, C. J., dissenting).

L. D. Summerfield, City Attorney of Reno, for Petitioner:

In one or two cases where the legislature has authorized the transfer of money raised by taxation from one fund to another, and the courts have held against the transfer, it will be found upon investigation that there was a constitutional prohibition against such procedure. The fact that the constitutional provision is necessary to prevent the legislature from so acting indicates strongly that in the absence of such a provision such transfers may be made. However, in the case at bar, strictly speaking, the question of the transfer of a special fund raised by a special tax is not involved. The tax here was levied and collected for general purposes. After being raised on that basis, the legislature directed a certain portion to be set aside for a certain purpose. Having the power to do this in the first instance, it had the further power to authorize the money so set apart to be transferred to the general fund, to be used for other general purposes.

"A statute must be construed, if possible, so as to give it force and effect." (*Hettel v. First Judicial District Court*, 30 Nev. 382, 96 Pac. 1062, 133 Am. St. Rep. 731.) "Courts will construe the language of a statute so as to give force and effect to, rather than to nullify, it." (*State v. Martin*, 31 Nev. 493, 103 Pac. 840.) "Particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the state, and of the object of the legislature in the creation of municipalities." (1 Dillon, Mun. Corp., sec. 235.)

An examination of the history of subdivision 3, section 10, article 12, will show that the first portion thereof has always authorized the levy and collection of a tax "for general purposes." (Stats. 1905, p. 112; 1911, p. 57; 1913, p. 329; 1915, p. 256; 1917, p. 102.)

Argument for Respondents

A municipality, under delegated authority, may do any act which the legislature itself can do, subject to constitutional limitations. (28 Cyc. 271, 310.)

Whether the transfer authorized be good or bad, on governmental principles, is not a question for the court, but one to be settled between the people and their representatives, whether those representatives be the members of the legislature or the city council of their political subdivision. (*Sharpless v. Mayor of Phila.*, 21 Pa. St. 147, 59 Am. Dec. 759; *State ex rel. Police Commissioners v. County Court*, 34 Mo. 546.)

James T. Boyd and Roy W. Stoddard, for Respondents:

This is an application, on the petition of the city of Reno, against C. H. Stoddard and D. W. Dunkle, respectively ex officio auditor and ex officio city treasurer, to compel the transfer to the general fund of moneys raised for a special purpose, namely, to provide for a sewage-disposal plant for the city. (Stats. 1915, p. 256.)

In connection with this act or amendment to the city charter, it is well to bear in mind the provisions of an act to prevent the pollution of the waters of rivers (Stats. 1915, p. 361) in arriving at a determination of the purpose and intention of the amendment of the city charter in 1915, and that the amendment of 1915, above referred to, makes it mandatory for the city of Reno to set aside the amount specified for the special purpose indicated.

The legislature of 1917 (Stats. 1917, p. 102) amended the amendment of 1915, by providing that "all moneys now held in any special fund not herein provided for may be transferred to the general fund of the city"; and it is for this court to determine what was the intention of the legislature in passing the amendment of 1917, and whether the construction to be placed upon the amendment authorizes the transfer of the fund in controversy. "Generally, taxes levied for one purpose cannot be applied to another." (28 Cyc. 1730.) "Where a tax expressly authorized by a valid statute for the payment of interest on county bonds has been levied and collected, the fund so created is

dedicated to a special purpose or impressed with a trust." (*Coler v. Board*, 89 Fed. 257.) "Courts are bound to uphold a prior law, if it and a subsequent one may subsist together, or if it be possible to reconcile the two together, and, unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force." (*State v. La Grave*, 23 Nev. 373; *State v. County Court*, 101 Pac. 907; *Tilden v. Esmeralda County*, 32 Nev. 319; *O'Neal v. New York M. Co.*, 3 Nev. 141; *State v. Oldfield*, 22 Okl. 863, 98 Pac. 925.)

By the Court, SANDERS, J.:

The city of Reno petitions this court for a writ of *mandamus* to compel C. H. Stoddard, as ex officio auditor of said city, and D. W. Dunkle, as ex officio treasurer thereof, to forthwith transfer all moneys held in a special fund to provide a sewage-disposal plant or system for the said city to the general fund of said city. The facts are as follows:

The legislature in 1915 (Stats. 1915, p. 256) amended subdivision 3 of section 10 of article 12 of the charter of the city of Reno. Section 5 of the amendatory act declares:

That section 10 of article 12, with other sections of the act, entitled "An act to incorporate the town of Reno, and to establish a city government therefor," approved March 16, 1903, as amended by Stats. 1905, p. 112, "are hereby amended so as to read as follows:

"SEC. 10. The city council, among other things, shall have power: * * *

"*Third*—To levy and collect annually for general purposes a tax of not to exceed three-quarters of one per cent upon the assessed value of all real and personal property within the city, and which is by law taxable for state and county purposes, fifteen per cent of which shall be set aside in a special fund to provide for a sewage-disposal plant or system for the city, and for no other purpose, until such time as said sewage-disposal

plant or system shall be actually installed and paid for; and in addition thereto to levy and collect annually a tax of not to exceed one-quarter of one per cent, upon the assessed value of all real and personal property within the city, which is by law taxable for state and county purposes, to provide a fund for the payment of the interest on the bonds of the city outstanding, and that may be lawfully issued and sold hereafter, and to provide a fund for the payment of the principal of such bonds, and for the redemption thereof as they shall mature, and for no other purpose."

The legislature in 1917 (Stats. 1917, p. 102) again amended subdivision 3 of section 10 of article 12 of said act by declaring:

That said section "is hereby amended so as to read as follows:

"SEC. 10. The city council, among other things, shall have power: * * *

"*Third*—To levy and collect annually for general purposes a tax of not to exceed three-quarters of one per cent upon the assessed value of all real and personal property within the city and which is by law taxable for state and county purposes; and in addition thereto to levy and collect annually a tax of not to exceed one-quarter of one per cent upon the assessed value of all real and personal property within the city, which is by law taxable for state and county purposes, to provide a fund for the payment of the interest on the bonds of the city outstanding, and that may be lawfully issued and sold hereafter, and to provide a fund for the payment of the principal of such bonds and for the redemption thereof as they shall mature, and for no other purpose; *provided*, that all moneys now held in any special fund not herein provided for may be transferred to the general fund of the city."

It is admitted that from March 22, 1915, there has been set aside by respondents, as ex officio officers of said city, from taxes levied and collected for general

purposes, in a special fund to provide for a sewage-disposal plant or system for Reno, in pursuance of the amendment of 1915, the sum of \$25,895.40, and that this sum still remains in said special fund. It is admitted that no steps have been taken by the city since said date to erect a sewage-disposal plant or system; that there are no creditors, or persons who have any vested interest in or to said moneys so set aside; that from March 22, 1915, to and including March 13, 1917, the date of the last amendment, there were no funds of the city in its treasury, or elsewhere, derived from the levy or collection of a tax or taxes upon assessed value of the real and personal property within said city, and segregated in accordance with the charter of said city, save and except such funds as were so derived and segregated in accordance with subdivision 3, section 10 of article 12, as amended by the legislature in 1915 and 1917. On July 9, 1917, the city council of Reno ordered respondents to transfer all moneys held in said special fund to provide a sewage disposal plant or system for said city to the general fund. The respondents refused, and still refuse, to make the transfer. The petitioner bases its claim for the transfer of said moneys upon the amendatory act of 1917. The respondents justify their refusal to make the transfer upon the amendatory act of 1915, and are of the opinion that said moneys of right belong to said special fund, and under the limitations imposed by the act of 1915 cannot be transferred.

1, 2. Cities are mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature, and the revenues of a city raised by taxation, though levied for specific public purposes, are so far subject to the legislative will, that by it they may be applied to other uses of the municipality, subject, of course, to constitutional limitations. (*Board of Commissioners v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *People ex rel. v. Power*, 25 Ill. 187; *State ex rel. v. Board of Education*, 141 Mo. 45, 41 S. W. 924; *Cooley's Mun.*

Corp., sec. 25, p. 76; Dil. Mun. Corp., sec. 1381, 1382, 5th ed.)

Our constitution provides that:

"The legislature shall provide for the organization of cities and towns by general laws; and restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, except for procuring supplies of water." (Sec. 8, art. 8, Const. Nevada; Rev. Laws, 345.)

3. It is obvious that the restrictions imposed by the amendatory act of 1915 are retained in the amendatory act of 1917, except the requirement that 15 per cent of the tax levied and collected for general purposes shall be set aside in a special fund to provide for a sewage-disposal plant or system for the city, which is omitted.

It is, no doubt, a well-settled rule in the construction of statutes, that where a statute provides (as in this case) that a certain former statute "is hereby amended so as to read as follows," any provision of such former statute which is not found in the new statute is repealed. There is a negative necessarily implied that such eliminated portion shall no longer be in force. (1 Sutherland, Stat. Const., sec. 246; Black on Int. of Laws, sec. 133, 23 Am. & Eng. Ency. p. 735; *State v. Horton*, 21 Nev. 306, concurring opinion; *Ratcliff v. People*, 22 Colo. 75, 43 Pac. 353; *State v. Routh*, 61 Minn. 205, 63 N. W. 621; *Helena v. Rogan*, 27 Mont. 135, 69 Pac. 709; *Guaranty Trust Co. v. Troy Steel Co.*, 68 N. Y. S. 915; *Fargo v. Ross*, 11 N. D. 369, 92 N. W. 449; *Sofers v. Commonwealth*, 97 Va. 759, 33 S. E. 384; *Nudgett v. Liebes*, 14 Wash. 482, 45 Pac. 19; *Ashland Water Company v. Ashland County*, 87 Wis. 209, 58 N. W. 235.)

4. The omitted provision being repealed or abrogated by its omission from the act of 1917, the question arises, what becomes of the special fund of \$25,895.40 already set aside to provide for a sewage-disposal plant or system for the city? This is answered by the proviso engrafted on the amendatory act of 1917: "*Provided*, that all moneys now held in any special fund not herein pro-

vided for may be transferred to the general fund of the city." It is, in effect, admitted by the pleadings that the language of the proviso can relate only to the "special fund" authorized by the act of 1915. The proviso, therefore, is an affirmative declaration to the effect that the city may transfer the fund in question to the general fund, and it is so manifestly inconsistent with and repugnant to the former act, when the city council has acted, that the two amendments cannot stand together.

5. It is unnecessary to extend this opinion, but it is insisted by respondents that by reason of contemporaneous legislation the city is brought under the ban of the general law relative to the pollution of the public streams of this state by the towns and cities thereof, and that if the said special fund be transferred to the general fund the city will be subjected to a suit to restrain it from polluting the waters of the Truckee River (Stats. 1917, p. 51) and will work great harm and threaten the health of the residents and public in general of the city of Reno.

The anti-pollution statutes are not involved in this proceeding, except as an incident to the cause which may have moved the legislature in 1915 to exercise its prerogative and amend the charter of the city so as to provide a sewage-disposal plant or system for the benefit of the inhabitants of the municipality, or prevent the pollution of the waters of the Truckee River. However provident the legislation of 1915 may have been, or however improvident the legislation of 1917 may be in the opinion of respondents, it constitutes no defense to this application for a writ of *mandamus*. The motives of the legislature are not subject to judicial inquiry. Its will is supreme to that of the judgment of courts as to the wisdom or policy of its legislation.

The writ should be granted.

It is so ordered.

Coleman, J., concurring

COLEMAN, J., concurring:

There is no doubt but that it was the intention of the legislature, by the act of 1917, to repeal that portion of the act of 1915 which provided for the setting aside of a certain portion of the revenue collected from property within the city of Reno as a fund to pay for the construction of a sewage-disposal plant. The dissenting opinion of the learned chief justice concedes as much. This much being conceded, it seems to me that the force of the argument presented in the dissenting opinion is lost. In other words, if, notwithstanding the policy of the state as to preventing the pollution of the public streams, the legislature repealed the provision in the act of 1915 providing for the creation of the fund for the construction of the sewage-disposal plant, why should that general policy enter into consideration in determining the force and effect of the portion of the amendatory act of 1917 which empowers the city to transfer the special fund to the general fund? The legislature, having decided to repeal that portion of the act of 1915 providing for the creation of a fund for a sewage-disposal plant, for reasons which no doubt seemed good to it, concluded to leave to the discretion of the city what disposition should be made of the money theretofore raised and placed in the fund. This seems to me to have been the clear intention of the legislature.

The learned chief justice contends that the acts of 1915 and 1917 amending the charter of the city of Reno and the various general acts relative to the pollution of the public streams of the state are *in pari materia*, and should be read together. I cannot agree with this view. In my opinion they are not *in pari materia*. The acts dealing with the question of the pollution of the public streams relate to one general subject, while the acts amending the charter of the city of Reno pertain to another.

McCarran, C. J., dissenting

MCCARRAN, C. J., dissenting:

I dissent.

The question presented here is one which turns entirely upon a construction of statutes. Subdivision 3 of section 10 of article 12 of the charter of the city of Reno, as amended in 1915, in dealing with the powers and duties of the city council, provides:

*“Third—*To levy and collect annually annually for general purposes a tax of not to exceed three-quarters of one per cent upon the assessed value of all real and personal property within the city, and which is by law taxable for state and county purposes, fifteen per cent of which shall be set aside in a special fund to provide for a sewage-disposal plant or system for the city, and for no other purpose, until such time as said sewage-disposal plant or system shall be actually installed and paid for; and in addition thereto to levy and collect annually a tax of not to exceed one-quarter of one per cent upon the assessed value of all real and personal property within the city, which is by law taxable for state and county purposes, to provide a fund for the payment of the interest on the bonds of the city outstanding, and that may be lawfully issued and sold hereafter, and to provide a fund for the payment of the principal of such bonds, and for the redemption thereof as they shall mature, and for no other purpose. (Stats. 1915. p. 256.)

It appears that, pursuant to the provisions of this statute, there was collected by way of taxation and placed in the special fund the sum of \$25,895.40. This money is now held by the respondents, in their official capacity, in the special fund to provide for a sewage-disposal plant or system for the city of Reno; and it is the refusal of of the respondents to transfer these moneys in the general fund that gives rise to these extraordinary proceedings.

Subdivision 3 of section 10 of article 12 of the charter of the city of Reno was again amended by the legislature of 1917, and by the amended section it is provided that the city council of the city of Reno shall have power:

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"To levy and collect annually for general purposes a tax of not to exceed three-quarters of one per cent upon the assessed value of all real and personal property within the city and which is by law taxable for state and county purposes; and in addition thereto to levy and collect annually a tax of not to exceed one-quarter of one per cent upon the assessed value of all real and personal property within the city, which is by law taxable for state and county purposes, to provide a fund for the payment of the interest on the bonds of the city outstanding, and that may be lawfully issued and sold hereafter, and to provide a fund for the payment of the principal of such bonds, and for the redemption thereof as they shall mature and for no other purpose; *provided*, that all moneys now held in any special fund not herein provided for may be transferred to the general fund of the city." (Stats. 1917, p. 102.)

The contention of petitioner here is based entirely upon the latter part of the section of the charter as amended in 1917:

"*Provided*, that all moneys now held in any special fund not herein provided for may be transferred to the general fund of the city."

Respondent asserts that there is no other special fund, and that the language here used refers by implication to the special fund created by the amendment of 1915, by reason of which said amendment the moneys so collected are now held in the special sewage fund.

We are here asked to interpret the statute, and from such interpretation we are asked to construe the amendment of 1917 to the effect that inasmuch as the legislature discontinued the tax for the special purpose, or discontinued the segregation of a percentage of the tax collected for general purposes into a special fund for a special purpose, therefore by implication we are to say that the fund so established was intended to be transferred to the general fund.

In order to ascertain the intention of the legislature, we may with propriety consider other laws existing on

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correlative subjects at the time this amendment to the city charter was enacted.

With a view to arriving at the intention of the legislature, we deem it proper to dwell at some length upon the history of legislation in this state bearing upon the subject for which the special fund was in this instance created, namely, the removal of the sewage of the city of Reno from the Truckee River.

In 1903 the legislature passed an act entitled "An act to prevent the pollution or contamination of the waters of the lakes, rivers, streams, and ditches in the State of Nevada, prescribing penalties, and making an appropriation to carry out the provisions of this act."

The act, *inter alia*, provides:

"SECTION 1. Any person or persons, firm, company, corporation, or association in this state, or the managing agent of any person or persons, firm, company, corporation, or association in this state, or any duly elected, appointed or lawfully created officer of any county, city, town, municipality, or municipal government in this state, who shall deposit or who shall permit or allow any person or persons in their employ or under their control, management, or direction to deposit in any of the waters of the lakes, rivers, streams and ditches in this state any sawdust, rubbish, filth, or poisonous, or deleterious substance or substances, liable to affect the health of persons, fish, or live stock, or place or deposit any such deleterious substance or substances in any place where the same may be washed or infiltrated into any of the waters herein named, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined in any sum not less than fifty dollars nor more than five thousand dollars, exclusive of court costs; *provided*, that in case of state institutions, municipalities, towns, incorporated towns and cities, when, owing to the magnitude of the work, immediate correction of the evil is impracticable, then in such cases the authorities shall adopt all new work,

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and as rapidly as possible reconstruct the old system of drainage, sewerage, and so as to conform with the provisions of this act; *and provided further*, that all such new and reconstructed systems shall be completed within four years from the date of passage hereof." * * * (Stats. 1903, p. 214.)

In 1907 the legislature amended the act by inserting in section 1 thereof the following:

"Provided, that in case of state institutions, municipalities, towns, incorporated towns or cities, when, owing to the magnitude of the work, immediate correction of the evil is impracticable, then in such cases the authorities shall adopt all new work, and as rapidly as possible reconstruct the old systems of drainage sewerage so as to conform with the provisions of this act; *and provided further*, that all such new and reconstructed systems shall be completed before March 20, 1911." * * * (Stats. 1907, p. 104.)

The legislature of 1909 again amended the act by extending the time within which the reconstructed sewerage systems should be completed to March 20, 1913. (Stats. 1909, p. 306.)

The legislature of 1911 again amended the act by extending the time within which the reconstructed sewerage systems should be completed to March 20, 1915. (Stats. 1911, p. 56.)

The legislature of 1913 again amended the act by extending the time within which the reconstructed sewerage systems should be completed to January 1, 1916. (Stats. 1913, p. 405.)

The legislature of 1915 amended the act by extending the time within which the reconstructed sewerage systems should be completed to January 1, 1918. (Stats. 1915, p. 361.)

The legislature of 1917 passed two separate and distinct acts, each of which had to do with the subject of the removal of sewage and other poisonous and deleterious substances from the waters of the lakes, rivers,

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streams, and ditches of the state. The act of March 8, 1917 (Stats. 1917, p. 51) made it the duty of the attorney-general, with the consent of the governor, to commence such action or actions, suit or suits against any and all persons, municipalities, towns, cities, corporations, or associations as may be necessary to prevent or restrain the pollution of any public stream or streams running in, into or through the State of Nevada, whether the source of pollution be within or without the State of Nevada.

The act of March 27, 1917 (Stats. 1917, p. 412) repealed the act of March 20, 1903, with its several amendments, and made no provision for time during which cities or towns should prepare for or provide for the removal of sewage or the like. By the latter act it is provided, *inter alia*:

"Any person or persons, firm, company, corporation or association, city or town who shall deposit, or who shall permit or allow any person or persons in their employ or under their control, management or direction to deposit in any of the waters of the lakes, rivers, streams or ditches in or running into or through the State of Nevada, or cause to be washed or infiltrated into any of said waters, or place or deposit where the same may be washed or infiltrated into any of said waters, any sawdust, pulp, oils, rubbish, filth, or poisonous or deleterious substance or substances which affects the health of persons, fish, or live stock, or renders said waters unpalatable or distasteful, shall be deemed guilty of a misdemeanor and upon conviction thereof in any court of competent jurisdiction shall be fined in a sum of not less than fifty (\$50) dollars, nor more than five hundred (\$500) dollars, exclusive of court costs."

Here we find successive legislative acts bearing upon and having to do with the subject of the removal of sewage and other deleterious and poisonous substances from the public waters of the state. The several session acts amending the statute of 1903 extended the time

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during which the work of reforming and reconstructing sewerage systems of the cities affected should be accomplished.

It is admitted that the city of Reno, situated as it is upon the Truckee River, is one of the cities directly affected by the act of 1903 and its several amendments.

The legislature of 1915, evidently with a view to the accomplishment of the matter sought to be brought about, not only fixed the time at which the city of Reno should have its sewage removed from the Truckee River, but, to insure the accomplishment of this object, amended a section of the city charter, and therein directed the city council of the city of Reno to segregate a portion of the tax raised for general purposes and place the same in a special fund to be used for that purpose, "and for no other purpose."

The language of subdivision 3 of section 10 of article 12 of the city charter, as amended in 1915, is direct, positive, explicit. It requires 15 per cent of the taxes imposed for general purposes and levied upon all real and personal property within the city of Reno to be set aside in a special fund to provide for a special thing, to wit, a sewage-disposal plant or system for the city, and directed that the money thus raised and funded should be used for "no other purpose." If the legislature of 1917 had been less emphatic in its enactments requiring cities of the class of which Reno is admitted to be one to remove their sewage from the public waters, the contention of petitioner here might be received with more favor.

Mr. Sutherland, in his work on Statutory Construction, tells us, and the text of the learned author is supported by splendid authority, that:

"Subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. The intention to repeal, however, will not be presumed, nor the effect of repeal

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admitted unless the inconsistency is unavoidable, and only to the extent of the repugnance. Implied repeals are not favored. One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed." (Sutherland on Statutory Construction, sec. 138, p. 180.)

Keeping this rule in mind, let us examine the amendment of 1915 and compare it with that of 1917.

The amended charter of 1915, carrying out a specific and consistent policy, created by plain and unmistakable language a specific fund, and with the emphasis of plain language limited the use and purpose of the money therein. The purview of that statute remained intact and the purpose of the fund created remained uppermost even after the enactment of the 1917 statute.

The act of 1915 amending the city charter of the city of Reno, creating, as it did, a special fund, must be regarded as existing cooperatively with the act of the same legislature extending the time within which the thing for which this special fund was created should be accomplished. Moreover, it must be regarded as a part of the general plan adopted by the legislature for the accomplishment of a given purpose and policy. In view of the fact that the legislature of this state continued its policy of requiring sewage and deleterious matter to be removed from the public streams as evidenced by the acts of 1917, we would not be justified in saying that by an implication found in another act of the same legislature it intended to take away the means whereby the thing sought to be made effective could be accomplished. In view of the policy of our legislature written into the several session acts from 1903 until the present time, and in view of the absence of specific legislation bearing upon a fund directly created for the purpose of carrying out this policy, it would, in our judgment, do violence to every rule of statutory construction to say that by implication the legislature did the idle thing of

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directing a city to remove its sewage from a public stream, directing the attorney-general of the state to commence an action for the accomplishment of such a result, and at the same time and in the same session pass an act taking from the city the means whereby such a result might be accomplished and such a suit avoided.

The effects and consequences of a statute must be considered and weighed in its construction where the precise intent is not plain or where the language is obscure or ambiguous. We must not lose sight of the object sought to be accomplished by the fund specifically created by the amendment of 1915. If in 1917 the legislature had intimated that it had abandoned its persistent policy in furtherance of which this fund was created, then indeed there might be some room for declaring that the legislature intended to do away with this fund and permit the money to be devoted to another use.

"The legislature," says Mr. Sutherland, "are presumed to know existing statutes, and the state of the law, relating to the subjects with which they deal. Hence that they would expressly abrogate any prior statutes which are intended to be repealed by new legislation. Where there is no express repeal, none is deemed to be intended, unless there is such an inconsistency as precludes this assumption; then it yields only to the extent of the conflict. Regard must be had to all the parts of a statute, and to the other concurrent legislation *in pari materia*; and the whole should, if possible, be made to harmonize; and if the sense be doubtful, such construction should be given, if it can be, as will not conflict with the general principles of law, which it may be assumed the legislature would not intend to disregard or change." (Sutherland on Statutory Construction, sec. 287, p. 371.)

See *State v. Donnelly*, 20 Nev. 214, 19 Pac. 680; *In Re Walley's Estate*, 11 Nev. 260.

In the case of *Abel v. Eggers*, 36 Nev. 381, we said:

"It is also a well-recognized principle that statutes relating to the same matter which can stand together

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should be construed so as to make each effective. (*State v. Donnelly*, 20 Nev. 214; *State v. Rogers*, 10 Nev. 319; *State v. Hoover*, 5 Nev. 141.) In the interpretation of statutes the courts so construe them as to carry out the manifest purpose of the legislature, and sometimes this has been done in opposition to the words of the act. (*Gibson v. Mason*, 5 Nev. 283.)"

The legislature created the fund here in question by specific terms, using language certain, positive, unmistakable. The legislature of 1917 discontinued the source from which this special fund derived its moneys. Nowhere in the amendatory act of 1917 does the legislature specifically or directly declare that the moneys now in this special fund shall be interfered with. The fund in which this money was held is not mentioned. Does a repeal of the diversion of revenue dispose of moneys already collected and held in special assignment for a specially legislated purpose? The legislature of 1915 provided for the collection of this money, for its diversion, and for its being "set aside in a special fund to provide for a sewage-disposal plant, etc." Did the legislature of 1917 at any place in their enactments say that this money theretofore collected and "set aside in a special fund to provide for a sewage-disposal plant" might be transferred to the general fund of the city? Did the legislature of 1917 anywhere mention this specially created sewage-disposal fund or the moneys therein contained? The answer to this must be in the negative. How then can the prevailing opinion find comfort in the language, where does it find support for the expression, "the proviso, therefore, is an affirmative declaration to the effect that the city may transfer the fund in question to the general fund"? The most that can be said of the language, and indeed the most that is claimed by the argument of counsel, is that by implication the legislature referred to this fund.

The prevailing opinion loses its force because it rests in its entirety on a statement unfounded, unsupported. The legislature nowhere made an *affirmative declaration* as to this specific fund; and even if it were admitted by

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the pleadings that the "language of the proviso can relate only to the special fund authorized by the act of 1915," such admission, if it could be found, would make an *affirmative declaration* out of that which is in fact only language of indirection and uncertainty.

The matter before is is not one which deals primarily with the question of repeal. It is rather one which calls for the consideration of the effect of an independent enactment by way of *proviso*. The amendatory statute of 1917 deals *in futuro*, not *in præsenti*. It does away with the future segregation of revenue to the special fund. The special fund, as it existed at the time of the enactment of the amendatory statute, is not mentioned, and reference to it can only be presumed by implication. If the legislative policy and contemporaneous legislation refute the presumption that the legislature by the proviso here in question intended to affect the special fund previously created for sewage-disposal purposes, then it is our duty to so hold. The very fact that the legislature of 1917 so framed the pollution statute heretofore quoted as to declare by specific language that—

"Any * * * city or town who shall deposit, or who shall permit or allow any person or persons in their employ or under their control, * * * to deposit in any of the waters * * * of the rivers * * * any * * * filth * * * which affects the health of persons, fish or live stock, or renders said waters unpalatable or distasteful, shall be deemed guilty of a misdemeanor; * * * "

—the very fact that this legislation was enacted without giving the cities and towns thereby affected time to adjust their sewerage systems as had been done by previous legislatures, speaks emphatically as to the policy of the legislature of 1917 on the question of sewage disposal. This of itself refutes the idea that the legislature intended to take away the funds already segregated by special legislation for the special purpose of sewage disposal. Does the legislature make a mandatory order as to sewage disposal and at the same time

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take away from the city the specially provided means whereby that order could be complied with? If it had done this by specific legislation, using plain and unmistakable language as to the transfer of the fund in question, it would be an inconsistent thing, to say the least. But where implication only is relied on, we are not allowed to indulge in other than the assumption of consistency by the legislative branch of our government. Was the legislature of 1917 guilty of indulging in contradictory policies? Did it provide for the bringing of suits by the attorney-general to prohibit stream pollution and at the same time authorize doing away with a special fund specially segregated for the special purpose of sewage disposal and which was held by a city for that and for *no other purpose*?

Again, did the repeal of the act of 1915 by a subsequent legislature repeal by implication or otherwise the pollution statute, to comply with which this special fund was alone usable? The only answer to the latter is that the legislature of 1917 made the policy against stream pollution more emphatic and peremptory. It thereby made the use and purpose to which this special fund was alone applicable one of immediate existence rather than of future emergency, one which required the immediate application of the fund to the special purpose for which it was specially created. Was this fund as it stood sufficient to accomplish the thing for which it was created? We do not know. Was the money already in the fund ample to complete a system of sewage disposal already advanced, and hence in the judgment of the legislature the segregation of revenue provided for by the former legislature should be discontinued? We are not advised. What we do know is that the purpose to be accomplished by the fund was a thing reenunciated by the legislature of 1917.

The fund existed. The object for which the fund was specially created was still present and unaccomplished. Contemporaneous legislation required this special object to be accomplished. If there is any presumption to be

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indulged in, it must be resolved by the court on the side of consistency, and we are bound to construe the language of the legislature, in view of the failure of that body to specially designate the fund, to have no reference to this special sewage-disposal fund which was declared by the legislature that created it as one expendable for no other purpose.

The assertion of the prevailing opinion as to cities being instrumentalities of the state is elementary; that question is not before us. We are asked here to construe an indirect, uncertain proviso which fails to mention the specific fund which respondents in their official capacity refuse to transfer. If the special sewage-disposal fund were specifically mentioned in the proviso, this controversy, I apprehend, would not be here. Moreover, contemporaneous legislation supports the assumption that, if the proviso found in the statute of 1917 had specifically named the special sewage-disposal fund of the city of Reno, it would not be found today upon the statute books, and we would not have been called upon to construe or interpret. The prevailing opinion says:

"It is obvious that the restrictions imposed by the amendatory act of 1915 are retained in the amendatory act of 1917, except the requirements that 15 per cent of the tax levied and collected for general purposes shall be set aside in a special fund to provide for a sewage-disposal plant or system for the city, which is omitted."

What has this to do with the thing already existent? What has this to do with the money already segregated and funded in accordance with previous law? Did the mere discontinuance of the segregation of 15 per cent of the tax levy in any way affect the fund already established? True, the fund would not grow in amount after the passage of the statute of 1917, but this in no wise affected the money already in the fund collected at a former time. If the legislature of 1917 had intended to provide for the diversion of this fund, why did it not mention such special sewage-disposal fund? Are we not bound, in view of contemporaneous legislation, to construe

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the absence of such specific mention or designation as the very strongest manifestation in favor of the legislative intent being to leave this sewage-disposal fund to be devoted to the purpose for which it was created? The prevailing opinion says:

"It is, no doubt, a well-settled rule in the construction of statutes that, where a statute provides (as in this case) that a certain former statute 'is hereby amended so as to read as follows,' any provision of such former statute which is not found in the new statute is repealed."

Admitting all this, what has it to do with the situation? The statute of 1917 admittedly repealed the statute which provided for the diversion of 15 per cent of the tax levy. Hence that diversion was to be no longer made by the financial department of the city government. If the legislature of 1917 had in specific language discontinued the segregation of revenue to the state sinking fund for the redemption of outstanding state bonds, would that of itself authorize the state controller to transfer moneys already held in such sinking fund to the general fund of the state? The language of the proviso is:

"That all moneys now held in any special fund not herein provided for may be transferred to the general fund of the city."

What word, I ask, in this proviso conveys the sense of "affirmative declaration"? What word in this proviso points specifically to the fund in question? Shall we read something into this statute not specifically found there? My understanding was that we were called upon to construe a statute, not to legislate.

The acts of the respondents in their official capacity as city auditor and city treasurer in segregating 15 per cent of the tax collected pursuant to the 1915 statute was not one involving discretion on their part, but rather was it expressly commanded by law. The creation of the fund was mandatory, and was directed for a given and specific purpose. That purpose was of a public nature, one in which the entire state was interested. It was a purpose growing out of a prescribed and long-continued policy.

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This policy was made more emphatic by the acts of the legislature of 1917. The purpose for which this special fund had been created has never been accomplished. No other means of accomplishing this purpose has been expressly provided. These are the salient facts which refute the idea that the legislature of 1917 intended to dissipate this fund. The construction of the sewage-disposal plant was not a matter in which the city alone was interested. The state, by whose repeated mandate the pollution of the river was declared obnoxious, was an interested party. The state had directed the segregation of this money into a special fund to be devoted to the eradication of the evil. It would seem to require more than a mere omission of the mention of this fund in the statute of 1917 to induce the conclusion that the legislature intended the fund to be devoted to another purpose. This is especially true in view of the failure of the legislature of 1917 to make even the slightest mention of this special fund. The state, and not the city, created this fund. The state, and not the city, declared the object to which it should be devoted. The state is a party interested in this fund so long as the object is unaccomplished. This being true, it would, in view of the policy of the state, seem to require more than mere words of indirection to warrant a conclusion which would authorize the application of this fund to another purpose.

In the concurring opinion of Mr. Justice COLEMAN, I find the query:

"In other words, if, notwithstanding the policy of the state as to preventing the pollution of the public streams, the legislature repealed the provision in the act of 1915 providing for the creation of the fund for the construction of the sewage-disposal plant, why should that general policy enter into consideration in determining the force and effect of the portion of the amendatory act of 1917 which empowers the city to transfer the special fund to the general fund?"

It is evident, from a reading of both the prevailing and concurring opinions, that my learned associates fail to

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distinguish between that principle of law which holds statutory provisions to be *in pari materia* and that cardinal principle, elementary in statutory construction, which requires a court in its attempt to arrive at the intention of the legislature to look to contemporaneous acts. It is not a question here as to whether the statutes relative to stream pollution and that relative to the creation or elimination of this particular fund are *in pari materia*. We are construing a statute, and we have a right and it is our duty to perform this judicial act guided by cardinal rules and principles laid down by text writers and authorities applicable to the question. The language of the proviso in the statute under consideration has been treated in both the prevailing and concurring opinions as though it were specific, direct, positive, when as a matter of fact the most that is contended for it by the brief and argument of most able counsel is that it is inferential, implicative.

The writ should have been denied.



JAMES G. SWEENEY

Associate Justice, 1907-1910

Chief Justice, 1911-1912

PROCEEDINGS
IN THE
Supreme Court of the State of Nevada

MONDAY, October 1, 1917.

Present—Hon. P. A. McCARRAN, Chief Justice.

Hon. B. W. COLEMAN, } Associate Justices,
Hon. J. A. SANDERS, }

and the Officers of the Court.

Hon. H. F. BARTINE, of the committee heretofore appointed to prepare appropriate resolutions upon the death of the Hon. JAMES G. SWEENEY, presented and read the following memorial:

JAMES G. SWEENEY

To the Honorable, the Supreme Court of the State of Nevada:

Your committee appointed to express the sentiments of the bench and bar of this State with reference to the Honorable JAMES G. SWEENEY, deceased, begs leave to submit the following:

On the 7th day of July, 1917, the Honorable JAMES G. SWEENEY, formerly a distinguished and honored member of this Court, fell into that final slumber from which no mortal ever awakes. For many months he had been in failing health, but, in view of his youth and natural physical vigor, few believed that he was stricken with a fatal ailment until a comparatively short time before the end came.

JAMES G. SWEENEY was a unique character. Ambitious for himself, he was at the same time absolutely true to his friends and was ever ready to go to all honorable lengths as an earnest of his friendship and

James G. Sweeney

fideliity. His open-hearted and open-handed generosity to those who deserved it—and even to some who, perhaps, did not—was almost without limit.

But it is to him as a public man, and to his record as such, that we are now paying tribute. He has gone from us forever, and his life's achievements will stand, an imperishable chapter in the history of our State and of the great Nation of which it forms a part. Brilliant to the point of being spectacular, it is doubtful if the purely civil history of any American State presents a parallel to the career of the man whose memory we honor today. Born in Carson City, Nevada, on the 24th day of January, 1877, he was elected a member of the Assembly to represent Ormsby County before he had attained the age of 24 years. While yet in his twenty-sixth year, he was elevated to the office of Attorney-General, and before he had reached the age of 30 years he was elected by a magnificent vote to the exalted position of Justice of this Court, the highest judicial office within the gift of Nevada's electorate. After serving two years as a member of the Legislature, four years as Attorney-General, and six years as Justice of the Supreme Court, the last two as Chief Justice, at the age of 36 years, an age at which most men are just beginning their official careers, he voluntarily retired to private life, and passed into the Great Beyond when his forty-first year was less than half spent.

All of this was done with no unusual advantages. He had no wealthy and influential relatives to aid him in his onward and upward march. His college education was a modest one, and in the legal profession, which was the grounding for his public work, he was essentially self-taught. In his every official position he made a shining mark. As a member of the Legislature, he was an acknowledged leader. As Attorney-General, his work was of high legal order. As a member of this Court, he was the author of decisions that will always give him a place of honor among the splendid jurists

James G. Sweeney

whose names glitter like stars upon the pages of our country's judicial history. What a record is this, and what volumes it speaks for the opportunities which this great republic of ours affords!

As a fitting concomitant of his official service, he was a natural politician. Always active, always aggressive, and, until the later years of his life, intense in his partisan feeling, he was an accepted leader and a recognized force in the party with which he affiliated from the year 1900 until his voluntary retirement in 1913.

Had he retained his health and strength, it is inconceivable that he would have remained long in private life. With his ability, his temperament, and his segregation from judicial environment, his reappearance in some public way was about as certain as anything in human affairs can be. Judging from what he had accomplished in the past, it is hard to place a limit upon what his achievements might have been had he lived the allotted years of man. But, in the full bloom of early middle age, he was taken from us, and the haunts and places in the midst of which he was born and which he loved so well shall know him no more forever.

To his surviving relatives—those who were so near and dear to him in life—we extend the full measure of our sympathy. They will miss him from the family circle. To them there will be a vacant chair; but it should be a comfort to them to know that he lived not in vain, and that he gave to the name of SWEENEY a place of honor in the annals of our State.

We, also, his associates of the bench and bar, shall miss him from our circle. We shall cherish his memory, feeling always that, through his untimely passing, the State has lost one of its most gifted, useful, and promising public men. Speaking to him personally as he sleeps, we can only say, in conclusion, "Fare thee well, our brother," and breathe a prayer that, far beyond the grave's dark shadow, in the realms of heavenly light, his soul has found a safe, a happy, and an eternal home.

James G. Sweeney

This is our tribute to our former friend and associate, and we ask that it be received and printed in the next published volume of the Nevada Reports.

F. H. NORCROSS,
J. M. McNAMARA,
H. R. COOKE,
JAMES T. BOYD,
H. F. BARTINE.

The CHIEF JUSTICE :

The report will be received, filed, and incorporated in the minutes of the proceedings of the Court, and it is ordered that the memorial be printed in the next volume of the Nevada Reports. A copy of the resolution as presented will be delivered to the relatives of the deceased Chief Justice.

The Court is indebted to the committee for the splendid service which it has rendered. We bow in sorrow at the name and memory of the eminent jurist who has so indelibly written his name upon the pages of the history of Nevada. The name of Justice SWEENEY will stand with the names of the great men who in the past years occupied this tribunal.

Out of respect to the memory of the deceased Chief Justice, the Court then adjourned.

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GENERAL INDEX

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ANIMALS.

1. UNLAWFUL GRAZING—EVIDENCE.

In damage action for unlawfully grazing sheep, defendants' testimony that plaintiff's sheep also grazed upon defendants' property to their damage held not to require a finding of damage for defendants. *Wheeler v. O'Brien*, 414.

ANIMALS—Continued.**2. UNLAWFUL GRAZING—SPECIAL DAMAGES—PLEADING.**

Under allegations that defendants during month of March grazed sheep upon plaintiff's property, thereby injuring it for grazing purposes, damages may be based upon the land's value for grazing purposes during the lambing season, without such damages being specially pleaded, where the land was most useful for this purpose. *Idem*.

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APPEAL AND ERROR.**1. ASSIGNMENT OF ERRORS.**

An assignment of errors is founded upon the bill of exceptions. *Coffin v. Coffin*, 345.

2. ASSIGNMENT OF ERRORS—LATE FILING—STRIKING.

Motion to strike assignment of errors, not filed in the time prescribed by Stats. 1915, c. 142, sec. 13, and no memorandum of errors being served on respondent pursuant to Rev. Laws, 5322, is well taken. *Gardner v. Pacific Power Co.*, 343.

3. ASSIGNMENT OF ERRORS—TIME FOR FILING—STATUTE—CONSTRUCTION.

Stats. 1915, c. 142, sec. 13, providing that assignments of error shall be served on the adverse parties and filed with the clerk of the supreme court within twenty days after an appeal has been taken, and that if not so filed no error shall be considered, is peremptory and leaves no room for construction, so that, if the assignment be not filed within the time limited, the omission may not be cured by a subsequent filing, in the absence of fraud, bad faith, or deception on the part of respondent. *Coffin v. Coffin*, 345.

4. BRIEFS—AFFIRMANCE.

Motion to affirm, copy of transcript of record not being served on respondent, as required by Supreme Court Rule 25, par. 3, and appellant's points and authorities or brief not being filed and served in the time provided by Rule 11, is well taken. *Gardner v. Pacific Power Co.*, 343.

5. CONSTITUTIONAL RIGHT OF APPEAL—STATUTE—CONSTRUCTION.

Stats. 1915, c. 142, sec. 13, requiring assignments of error to be served and filed within twenty days, does not deprive an appellant of his constitutional right of appeal, since while the constitution gives the right of appeal, and the legislature, under the pretense of prescribing forms, cannot deprive parties of substantial rights, the constitutional right of appeal is to be enjoyed and exercised subject to the regulations of law and practices of the court. *Coffin v. Coffin*, 345.

6. FINDINGS—CONCLUSIVENESS.

Where there is a substantial conflict in the evidence on a

material issue, the trial court's determination will not be disturbed, if it is supported by substantial evidence. *In Re Gordon*, 300.

7. FINDINGS—PRESUMPTION—EVIDENCE TO SUPPORT.

Where the evidence is not included in the transcript, the supreme court is bound to assume that it supports the findings. *Phillips v. Snowden Placer Co.*, 66.

8. PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

The dismissal of an action without affording plaintiff an opportunity to amend cannot be complained of, where there was no application for a modification of the order or for time to amend. *Keenan v. Keenan*, 351.

9. RESERVING GROUNDS FOR REVIEW—EVIDENCE—SUFFICIENCY OF OBJECTION.

Rulings upon evidence cannot be reviewed when challenged only by general objections. *Wheeler v. O'Brien*, 414.

10. REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Where the evidence was conflicting, and there was substantial evidence to support the decision of the trial court, the supreme court cannot disturb the findings. *Carey v. Clark*, 151.

11. REVIEW—HARMLESS ERROR.

Where plaintiff's complaint was based on a record of a judgment rendered in a foreign state, the sustaining of a demurrer and dismissal of the complaint without affording an opportunity to amend was harmless, though contrary to the better practice, for an amendment could not change the record. *Keenan v. Keenan*, 351.

12. RIGHT TO APPEAL—STATUTE.

It is not lightly to be assumed that from failure or omission of a special act to provide for an appeal the legislature intended to deny such right to any person whose civil and legal rights are involved. *O'Donnell v. District Court*, 428.

See CRIMINAL LAW, 7; QUIETING TITLE, 2, 3; WATER AND WATERCOURSES, 3.

APPEAL FROM JUSTICE'S COURT. See JUSTICES OF THE PEACE, 1, 2.

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ATTORNEY AND CLIENT.

1. DISBARMENT—GROUNDS.

An attorney's action in knowingly and fraudulently procuring the service of summons in a divorce action in which he was counsel for plaintiff, upon another than defendant, and

ATTORNEY AND CLIENT—Continued.

by falsely representing to the officer that the person served upon was said defendant, procured him to make a return of service showing falsely that the summons had been duly served upon said defendant, was misconduct sufficient for disbarment. *In Re Bailey*, 139.

2. DISBARMENT PROCEEDINGS—EVIDENCE—SUFFICIENCY.

In a proceeding for disbarment of an attorney, evidence, consisting in part of an affidavit, held to support a charge that respondent by falsely and wilfully representing to an officer that affiant was defendant in a divorce action in which respondent was attorney for plaintiff, procured the service of summons on affiant and a false affidavit of service. *Idem*.

3. PROCEEDINGS FOR DISBARMENT—EVIDENCE.

In a proceeding for the disbarment of an attorney, evidence that an affidavit of service of summons in a divorce suit, in which plaintiff was represented by respondent, associated with another, was altered after it was made so as to show a valid service is insufficient, as against the positive sworn denial of the attorney, to show that he made the alteration. *In Re Winners*, 335.

See **LIMITATION OF ACTIONS**, 4.

ATTORNEYS' FEES. See **JUDGMENT**, 1.

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BILL OF EXCEPTONS. See **APPEAL AND ERROR**, 1.

"BITE." See **CRIMINAL LAW**, 12.

BONA FIDE RESIDENCE. See **DIVORCE**, 4, 6.

BOUNDARIES.**1. LAND CONVEYED—COURSES AND DISTANCES—"PERMANENT MONUMENT."**

It is a fundamental rule in construing conveyances that courses and distances give way to permanent monuments, and the northerly side line of a street, extended, is in effect a "permanent monument." *Carey v. Clark*, 151.

BRIEFS. See **APPEAL AND ERROR**, 4.

BURDEN OF PROOF. See **MARRIAGE**, 2; **REFORMATION OF INSTRUMENTS**, 1; **TRIAL**, 1.

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CHARACTER OF JUDGMENT AGAINST PARTNERS. See PARTNERSHIP, 1.

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CHARITABLE USE. See CHARITIES, 5.

CHARITIES.

1. CONDITION—ESTABLISHMENT BY FRATERNAL ORDER OF A HOME "WORTHY OF ITS NAME."

A devise conditioned upon establishing by fraternal order of an orphans' home "worthy of its name" was satisfied by the establishment of a home which, considering the strength of the order in the state, the population of the state, and the general conditions existing therein, compared favorably with similar institutions of the order elsewhere. *In Re Hartung*, 262.

2. CONDITIONS — PERFORMANCE — SUFFICIENCY— ESTABLISHMENT OF ORPHANS' HOME "NEAR" A CITY.

A devise conditioned on the establishment of an orphans' home "near" a city was satisfied by its establishment within the city corporate limits: the apparent intention by such direction being to confine the location of the home to the vicinity of the city, and not to exclude it from the city limits. *Idem*.

3. CONSTRUCTION—DESIGNATION OF LEGATEES—CHARITABLE INSTITUTIONS — BEQUEST TO FRATERNAL ORDER TO ESTABLISH AN ORPHANS' HOME "WORTHY OF ITS NAME."

Under a will devising the residue of an estate to an Independent Order of Odd Fellows, the income therefrom to be paid over to them annually. If within five years from testator's death the order established a home for orphans "worthy of its name," the words "worthy of its name" did not require the expenditure therefor of the sum of \$25,000 as specified for a school building in another paragraph of the will, but the will made the order itself judge as to whether or not the home was worthy of its name, subject to the right of the courts to finally determine the question. *Idem*.

4. CONSTRUCTION—INTENTION OF TESTATOR—"MONUMENT."

A will gave the residue of the testator's estate to defendant fraternal order if, within five years from the date of his death, the fraternal order should establish a home for orphans and foundlings to be named after the testator's son, and providing, as an alternative, if the order should not accept, a similar gift of the income of the residue to a school district on condition they build an industrial school named after testator's son, or, in default of the district's acceptance, a similar gift to the state university to establish an industrial school fund named after testator's son. *Held* that, the intention of the testator being to provide a "monument" or artificial structure for the purpose of preserving the memory of his son, the fraternal order was not entitled to the annual income of the estate in any event, but only so long as it maintained the home. *Idem*.

CHARITIES—*Continued.*

5. CONSTRUCTION OF BEQUEST—CHARITABLE USE.

A bequest of the income of an estate, to be paid over to a fraternal order annually, if within five years from testator's death the order established an orphans' home as provided therein, *held* not void as imposing no imperative duty upon the order to devote the money to a charitable use, since under the will the income was to be used in the maintenance of the home.
Idem.

COHABITATION. See MARRIAGE, 2.

COMMON-LAW MARRIAGE. See MARRIAGE, 1, 2, 3; TRIAL, 1.

COMMON-LAW RULE. See RELIGIOUS SOCIETIES, 2.

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COMPENSATION TO INJURED WORKMEN. See MANDAMUS, 5.

COMPLAINT. See APPEAL AND ERROR, 8; DIVORCE, 7; QUIETING TITLE, 1, 2, 3; WATER AND WATERCOURSES, 1.

CONCLUSIVENESS. See APPEAL AND ERROR, 6.

CONCLUSIVENESS OF JUDGMENT. See JUDGMENT, 1.

CONDITIONAL DEVISE. See CHARITIES, 1, 2, 3, 5.

CONFLICTING EVIDENCE. See APPEAL AND ERROR, 10.

CONFLICTING TESTIMONY. See TRIAL, 2.

CONSENT. See HOMESTEAD, 2; JUSTICES OF THE PEACE, 1.

CONSIDERATION. See SALES, 1, 2.

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CONSTITUTIONAL AND STATUTORY PROVISIONS. See JUSTICES OF THE PEACE, 3.

CONSTITUTIONAL DEBATES. See CONSTITUTIONAL LAW, 2.

CONSTITUTIONAL LAW.

1. CONSTRUCTION.

The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it, which intent is to be found in the instrument itself, as it is to be presumed that language has been employed with sufficient precision to convey it, and, unless it appears that the presumption does not hold in the particular case, nothing will remain but to enforce it. *Wren v. Dixon*, 170.

2. CONSTRUCTION—DEBATES.

In the construction of a constitutional provision, it is not improper to examine the debates on the subject, though they

are not authoritative, as it is the text of the constitution which was adopted. *Phillips v. Snowden Placer Co.*, 66.

3. CONSTRUCTION—REPEAL OF STATUTES.

Statutes may be nullified, in so far as future operation is concerned, by a constitution as well as by statute, as the constitution is the direct, positive, and limiting voice of the people, and may establish a policy, fix a limit to legislation on a given subject, or prohibit specified acts as being performed by public servants. *Wren v. Dixon*, 170.

4. CONSTRUCTION—SELF-EXECUTING PROVISIONS.

Const. art. 10, sec. 1, as amended in November, 1902 (Stats. 1901, p. 136), declared that the legislature should provide a uniform and equal rate of assessment and taxation to secure a just valuation of real and personal property, mining claims, etc., and that the acreage of patented claims should be assessed at the valuation of \$10 per acre. Stats. 1905, c. 58, provided for the assessment of patented mines at such valuation. Article 10, sec. 1, as amended in 1906 (Stats. 1907, p. 501), provided that patented mining claims should be assessed at not less than \$500, except when \$100 in labor has been actually performed on such mine during the year, in addition to the tax on the net proceeds, and no legislation was passed pursuant to such provision until 1913. *Held*, that the constitutional amendment of 1906 was self-executing at least as to the provision for taxation of patented mines, and absolutely nullified the statute of 1905, so that an assessment thereunder in 1909 was invalid. *Idem*.

5. MOTIVE OR POLICY OF LEGISLATURE—POWER OF COURT.

The motives of the legislature are not subject to judicial inquiry, and its will is above the judgment of the courts as to the wisdom or policy of legislation. *City of Reno v. Stoddard*, 537.

6. SELF-EXECUTING PROVISIONS.

Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void, and no legislation is required to execute such provision; but they are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law. *Wren v. Dixon*, 170.

7. SELF-EXECUTING PROVISIONS—CONSTRUCTION.

In determining when a constitutional provision is self-executing, there is a distinction between a declarative limitation of legislative power on a given subject, within which legislation may or should be enacted, and positive constitutional inhibition which no legislative act can relieve or modify; the former might require future legislation; the latter must, from its nature, be self-executing. *Idem*.

See CRIMINAL LAW, 2, 3; TAXATION, 1, 2.

CONSTITUTIONAL LIMITATIONS. See MUNICIPAL CORPORATIONS, 1.

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CONSTRUCTION OF DECREE. See DIVORCE, 5.

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CONSTRUCTION OF STATUTES. See APPEAL AND ERROR, 3, 5;
LIMITATION OF ACTIONS, 5, 6; STATUTES, 1, 2.

CONSTRUCTION OF WILLS. See CHARITIES, 3, 4, 5; WILLS, 1.

CONTEST. See WILLS, 2.

CONTRACTS.

1. VALIDITY—IMPOSSIBILITY OF PERFORMANCE—MISTAKE.

The contract whereby plaintiff abandons public lands, on which she has located mining claims, in consideration of the payment to her by defendant of \$100 a month, till sale of 160 acres of the land, and agreement of defendant to make application for withdrawal, under the Carey Act (Act of Aug. 18, 1894, c. 301, 28 Stat. 372) of said lands and other lands, and to appropriate and develop them thereunder, the same to be sold, and a fifth of the proceeds of sale to be paid to plaintiff, is void as impossible of performance, and made under a mutual mistake; said act not allowing of sale of withdrawn land by the one withdrawing it, but only development of an irrigation system and sale of water therefrom to settlers, who make entry on the land and buy it from the state. *Miller v. Thompson*, 35.

See INTOXICATING LIQUORS, 1; LIMITATION OF ACTIONS, 4.

CONTROL OF FUNDS BY LEGISLATURE. See MUNICIPAL CORPORATIONS, 1, 2.

CONTROL OF TESTIMONY BY PHYSICAL FACTS. See EVIDENCE, 1, 6.

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CONVEYANCES. See BOUNDARIES, 1.

CONVICTION. See CRIMINAL LAW, 1.

CORPORATIONS. See CRIMINAL LAW, 5; TROVER AND CONVERSION, 1.

COSTS.

1. ON APPEAL—COST BILL—TIME FOR FILING.

A cost bill, though not filed until after decision on rehearing, was filed in time. *Ramelli v. Sorgi*, 281.

2. ON APPEAL—TRANSCRIPT.

In view of Rev. Laws, 5333, providing that when appellant specifies as ground for appeal that the judge erred in denying a motion for new trial on ground that the evidence did not support the judgment and does not prevail, he shall not recover

costs for the statement of the testimony, although he prevails on other alleged errors on an appeal from the judgment and from an order denying a motion for a new trial, where the only relief granted appellant was on the appeal from the judgment based on the judgment roll alone, appellant is not entitled to costs for the transcript on appeal from the order denying his motion for a new trial. *Idem*.

See MINES AND MINERALS, 2.

COURSES AND DISTANCES. See BOUNDARIES, 1.

COURTS.

1. FEDERAL SUPREME COURT—REVIEW OF STATE COURT—FEDERAL QUESTION.

To suggest or set up a federal question for the first time in a petition for rehearing in the highest court of the state is not in time. *Wren v. Dixon*, 173.

2. PRESUMPTION AS TO JURISDICTION.

The presumption in favor of regularity of proceedings in a court of general jurisdiction, necessary to authorize it to act, does not apply in a proceeding not according to the common law. *Danforth v. Danforth*, 435.

3. PRESUMPTION AS TO JURISDICTION—DIVORCE PROCEEDINGS.

An action for absolute divorce is a proceeding not according to common law, to which the presumption in favor of regularity of proceedings in a court of general jurisdiction, necessary to authorize it to act, does not apply. *Idem*.

4. REVIEW BY FEDERAL SUPREME COURT—FEDERAL QUESTION.

In an action to quiet title to a mining claim and mill site claimed under a United States patent duly recorded, where the agreed statement of facts asserted defendant's adverse possession under a certificate of tax sale, and precluded the idea of plaintiff's possession, the court's assertion that plaintiff had never taken possession was within the record, especially where the judgment for defendant did not turn upon such assertion, and a petition for a writ of error to the United States Supreme Court on the ground that the court's opinion raised a federal question would be denied. *Wren v. Dixon*, 173.

See APPEAL AND ERROR, 6; CONSTITUTIONAL LAW, 5; CRIMINAL LAW, 2, 3, 4; DEPOSITIONS, 1, 2; DIVORCE, 3; INSANE PERSONS, 1, 2; MANDAMUS, 2, 3; MINES AND MINERALS, 2; STATUTES, 1; TRIAL, 2; WATER AND WATERCOURSES, 1.

CRIMINAL LAW.

1. CONVICTION—NOTICE OF APPEAL—SUFFICIENCY—STATUTE.

Rev. Laws, 7513, provides that, on appeal from a conviction before a justice, appellant shall file with the justice and serve upon the district attorney a notice, setting forth the character of the judgment and his intention to appeal therefrom. A notice of appeal was addressed to the district attorney and to an acting justice of the peace, stating that defendant intended to appeal, and did thereby appeal, from a conviction in the justice court of receiving and buying personal property from an

CRIMINAL LAW—*Continued.*

intoxicated person, and from the judgment and sentence of the justice court imposing a fine, and in the alternative an imprisonment, upon questions of both law and fact. *Held*, that the notice of appeal was sufficient. *Jensen v. District Court*, 135.

2. COURTS—MUNICIPAL COURT—JURISDICTION—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const., art. 6, sec. 6, gives to district courts original jurisdiction in cases involving the legality of any tax, assessment, or municipal fine, etc.; section 8 requires the legislature to determine the number of justices of the peace in each city, etc., and provides that justice's courts shall not have jurisdiction of cases conflicting with the jurisdiction of the courts of record; and section 9 requires the legislature to fix by law the jurisdiction of municipal courts. The charter of the city of Reno (art. 14, sec. 1) created a municipal court, by section 3 gave it jurisdiction as then provided for justices of the peace as to civil or criminal cases for the violation of any ordinance, and by section 6 provided that it should be treated as a justice's court, in case its proceedings should be questioned. Rev. Laws, 5721, relating to transfer of causes from justice's court, provides that the parties cannot give evidence on questions involving the legality of any tax, municipal fine, etc. An ordinance imposed a certain license upon every attorney practicing his profession in the city, payable quarterly in accordance with the gross receipts, and thereunder petitioner was convicted in the municipal court and committed. *Held*, where the issue involved the legality of a tax and the constitutionality of the ordinance imposing the tax, the municipal court had no jurisdiction, and was bound to transfer the proceedings to the district court. *In Re Dixon*, 228.

3. COURTS—MUNICIPAL COURT—JURISDICTION—LEGALITY OF TAX—CERTIFICATION OF QUESTION.

In such case, where defendant challenged the legality of the tax or questioned the constitutionality of the ordinance in the municipal court, that court was ousted of jurisdiction and should have certified the pleading to the district court. *Idem*.

4. COURTS—MUNICIPAL COURT—PLEADING—VERIFICATION.

No plea by a defendant in a justice's court need be verified, and such rule applies with equal force to the municipal court. *Idem*.

5. FALSE PRETENSES—BY OFFICER OF CORPORATION—INDICTMENT.

Indictment charging the president of an insurance corporation with obtaining money by selling stock under false pretenses stated a felony under Rev. Laws, 6704, defining crime of obtaining money under false pretenses, and not a misdemeanor, under section 1174, prohibiting officer of any corporation from making false representations, the fact that the accused received the money as president being immaterial. *In Re Crane*, 338.

6. FALSE PRETENSES—STATUTORY PROVISIONS.

General Incorporation Laws, sec. 73 (Rev. Laws, 1174), making it a misdemeanor for officer of any corporation to make false

representations, does not affect the crime of obtaining money under false pretenses defined by Rev. Laws, 6704. *Idem*.

7. HABEAS CORPUS—GROUNDS FOR RELIEF—DEFECTS IN INDICTMENT.

Defendant, convicted of obtaining money under false pretenses, having had objections to indictment overruled, was protected by his remedy of appeal and *habeas corpus* for his discharge would not lie. *Idem*.

8. INDICTMENT AND INFORMATION—STATEMENT OF OFFENSE.

Whether the offense charged be a felony or misdemeanor is to be determined by the indictment's statement of facts and language employed. *Idem*.

9. INDICTMENT AND INFORMATION—SURPLUSAGE.

In view of Rev. Laws, 7052, providing that evidence tending to prove charge need not be stated in the indictment, such allegations will be rejected as mere surplusage. *Idem*.

10. MAYHEM—EVIDENCE—SUFFICIENCY.

Evidence held to show permanent disfigurement so as to support conviction of mayhem. *State v. Enkhhouse*, 1.

11. MAYHEM—INFORMATION—OBJECTION TO SUFFICIENCY—TIME.

An information charging mayhem in the language of Rev. Laws, 6416, defining the offense as unlawfully depriving a human being of a member of his body, or disfiguring or rendering it useless, such as slitting the ear, without charging permanent disfigurement, which, under section 6418, is necessary to conviction, is nevertheless good in the absence of demurrer. *Idem*.

12. MAYHEM—INFORMATION—SUFFICIENCY—"SLIT."

Under Rev. Laws, 6416, defining mayhem to include slitting the ear of a human being, and in view of section 6417, stating that it is immaterial how the injury is inflicted, an information charging that accused bit off a portion of an ear of one C, is sufficient, though "slit" may be broader than "bite." *Idem*.

13. MAYHEM—INSTRUCTIONS—INCLUDED OFFENSES.

Under conclusive evidence of permanent disfigurement, it is not error to refuse instruction permitting conviction of the lesser offense of assault, under Rev. Laws, 6418, which applies only if permanent disfigurement is not shown. *Idem*.

14. MAYHEM—INSTRUCTIONS—PERMANENT DISFIGUREMENT—PREJUDICE.

An instruction to convict if permanent disfigurement is shown, though incomplete, in failing to define permanent disfigurement, is not prejudicial, where the evidence is without conflict as to extent of the injury which manifestly was a permanent disfigurement, especially in the absence of request for further instruction. *Idem*.

15. MAYHEM—SENTENCE—MINIMUM.

Since Rev. Laws, 6416, providing a maximum punishment for mayhem of fourteen years, does not provide a minimum, the judge may fix the minimum at five years, under section 7260, as amended by Stats. 1915, c. 157, providing that if no minimum is fixed, the court may fix it at one to five years. *Idem*.

DAMAGES. See EVIDENCE, 3; WATER AND WATERCOURSES, 3.

DAMAGES FOR WRONGFUL GARNISHMENT. See GARNISHMENT, 1, 2, 3.

DAMS. See EVIDENCE, 3; WATER AND WATERCOURSES, 1, 2, 3.

DECLARATION OF HOMESTEAD. See HOMESTEAD, 2.

DECLARATIVE LIMITATION OF LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 7.

DEEDS.

1. CONSTRUCTION BY PARTIES.

In suit to quiet title against a defendant who sought reformation of his deed to comply with plaintiff's agreement to convey, alleged in the answer, where the parties themselves had construed an ambiguous provision of the agreement, the trial court properly refused to sustain the defendant's contention contrary thereto. *Carey v. Clark*, 151.

DEFECTS IN INDICTMENT. See CRIMINAL LAW, 7, 8.

DEFENDANT. See QUIETING TITLE, 1.

DEMURRER. See PLEADING, 2, 3, 4; QUIETING TITLE, 2.

DEMURRER TO ENTIRE PLEA OR ANSWER. See PLEADING, 4.

DEMURRER TO WHOLE PLEADING PARTIALLY GOOD. See PLEADING, 3.

DENIAL OF AFFIRMATIVE ANSWER. See PLEADING, 5.

DEPOSITIONS.

1. ANSWERING QUESTIONS — CONTUMACIOUS REFUSAL — PENALTY — STRIKING PLEADING.

Where plaintiff in giving his deposition refused under advice and command of his counsel to answer certain questions until the court had ruled that they should and must be answered, his refusal was not contumacious, nor was he a recalcitrant witness, and it was error, before ruling that the questions must be answered, to strike his complaint. *Roberson v. Kilborn*, 423.

2. ANSWERING QUESTIONS — CONTUMACIOUS REFUSAL — PENALTY — STRIKING PLEADING — DISCRETION OF COURT.

Conceding questions propounded in taking a deposition were legal and pertinent, it was an arbitrary exercise of authority to enter judgment against defendant before giving him an opportunity to answer the questions propounded and ruled to be proper. *Idem*.

3. READING BY OTHER PARTY — OBJECTION BY PARTY TAKING.

Where testimony legally objectionable in substance was elicited from the plaintiff on cross-examination by his attorneys in his deposition taken by defendants, and the deposition was read in evidence by plaintiff as provided for by Comp. Laws, 3504, thereby making the deposition plaintiff's own evidence under the provision to that effect of section 3505, an objection made

by defendants on the trial to the admission of such objectionable testimony should have been sustained, though the deposition was taken on defendants' motion, since, under a further provision of section 3504, the evidence taken in a deposition is subject to all legal exceptions. *McLeod v. Miller & Lux*, 447.

4. TESTIMONY—OBJECTION AT TRIAL.

The objection to such substantially inadmissible evidence was properly made at the trial instead of at the taking of the deposition, under the provision of Comp. Laws, 3504, that depositions may be used upon the trial subject to all legal exceptions. *Idem*.

DESCENT AND DISTRIBUTION.

1. RIGHT OF HEIRS—ESTATE IN ADMINISTRATION.

Where an administrator or executor has been appointed, and the estate is in the course of probate, it is the right of the heirs to maintain an action as against third persons for the possession of the realty. *Wren v. Dixon*, 172.

2. WILLS—TITLE—TIME OF VESTING.

Under the statutory provisions and procedure relative to the estates of decedents, the title to real estate vests in the heirs and devisees at the moment of the death of the testator or intestate, subject only to the right of possession of the executor or administrator under Rev. Laws, 5950, for the payment of the debts and expenses of administration, with the right in the administrator to possession until the estate is settled or delivered over to the parties entitled by the order of the probate court. *Idem*.

DESIGNATION OF LEGATEES. See CHARITIES, 3.

DETERMINATION OF FACTS FROM CONFLICTING TESTIMONY. See TRIAL, 2.

DISBARMENT. See ATTORNEY AND CLIENT, 1, 2, 3.

DISCRETION. See MANDAMUS, 1, 2.

DISCRETION OF TRIAL COURT. See DEPOSITIONS, 2; PARTNERSHIP, 1.

DISMISSAL AND NONSUIT.

1. ABANDONMENT OF CAUSE.

At common law the essential of a nonsuit was abandonment of the cause by the plaintiff. *Danforth v. Danforth*, 435.

2. WHAT CONSTITUTES—DISMISSAL OR ON MERITS.

A judgment apparently on the merits dismissing the libel will not be considered one of nonsuit on motion of defendant, as authorized by Rev. Laws, 5237, subd. 5; it not appearing defendant made any such motion. *Idem*.

3. WHAT CONSTITUTES—DISMISSAL OR ON MERITS.

Judgment reading, "And now all and singular in the premises being seen, heard and fully understood, and the material facts alleged in the libel not sufficiently proved to the satisfaction of

DISMISSAL AND NONSUIT—Continued.

the court, said libel is denied," indicates, not an abandonment of the cause by plaintiff, the essential at common law of a nonsuit, but that the cause was submitted and determined on the merits. *Idem*.

DISMISSAL OF ACTION. See **APPEAL AND ERROR**, 8, 11; **WATER AND WATERCOURSES**, 1.

DISPOSITION OF MONEY FROM LICENSES. See **INTOXICATING LIQUORS**, 2.

DISTRICT COURT. See **JUSTICES OF THE PEACE**, 1, 2, 3; **MANDAMUS**, 2.

DIVISION OF PROPERTY. See **DIVORCE**, 1, 3.

DIVORCE.**1. ACTIONS—DIVISION OF PROPERTY.**

Where a wife procured a judgment of divorce in a foreign state other than Nevada, of which her husband was a resident, she cannot, on the ground of the liberality of the Nevada divorce laws, maintain an action for the division of community property situated in Nevada, for she might properly have maintained her suit in Nevada. *Keenan v. Keenan*, 351.

2. ACTIONS—NECESSITY OF ANSWER.

An answer in divorce is not necessary for a judgment on the merits against plaintiff. *Danforth v. Danforth*, 435.

3. ALIMONY—DIVISION OF PROPERTY—STATUTE.

Rev. Laws, 2166, declares that in case of the dissolution of the marriage the community property must be equally divided between the parties, and the court granting the decree must make such division as the nature of the case may require, provided that when the decree is rendered, on the ground of adultery or extreme cruelty, the party found guilty is entitled only to such portion of the community property as the court granting the decree may, in its discretion, deem just and allow. A wife secured in a foreign state a decree divorcing her from her husband, who was a resident of the State of Nevada, in which state the community property of the parties was situated. *Held*, that she could not thereafter maintain an independent action in the Nevada courts to secure a division of the community property pursuant to the statute; the statute having reference only to the court granting the divorce. *Keenan v. Keenan*, 351.

4. BONA FIDE RESIDENCE—EVIDENCE.

Evidence in a suit for divorce *held* sufficient to establish plaintiff's *bona fide* residence within the state, though she admitted she was living at a hotel and owned no property within the state. *Merritt v. Merritt*, 385.

5. JUDGMENT—CONSTRUCTION.

In a suit instituted in a foreign state other than the state of her husband's residence and in which he had no property a wife secured a decree of divorce. *Held*, that such decree, though treated as one *in rem*, dissolving the bonds of matrimony, has no binding effect *in personam* against the defendant

husband, though he was personally served with process in the state of his residence, for such service did not bring him within the jurisdiction of the foreign court. *Keenan v. Keenan*, 351.

6. JURISDICTION.

A complaint in divorce alleging plaintiff's residence in W. county, that defendant is within the jurisdiction of the court and can be served in W. county, gives the court jurisdiction under act of February 23, 1915 (Stats. 1915, c. 28), section 1, amending Stats. 1861, c. 33, sec. 22, giving jurisdiction if defendant can be found in the county. *Merritt v. Merritt*, 385.

7. JURISDICTION—COMPLAINT.

Under Stats. 1915, c. 28, sec. 1, providing that divorce may be obtained by complaint to the court of the county in which the cause therefor accrued, or in which defendant shall reside or be found, or in which plaintiff resides, if the parties last cohabited there, or in which plaintiff shall have resided for six months, the complaint of a husband, not alleging his residence in the county, but merely that he is now therein, does not bring his status within the jurisdiction of the court, the matrimonial domicile of the parties being in another state, and the marital offenses complained of being such as might have been determined by the courts of the matrimonial domicile, though the complaint alleges that defendant can be found in and is a resident of the county, the right of the wife to acquire another domicile separate from him, where their unity is dissolved, not availing him. *Aspinwall v. Aspinwall*, 55.

See COURTS, 3; JUDGMENT, 2, 3, 8.

DOMICILE.

1. EFFECT OF MARRIAGE.

At common law, it was a well-founded rule that a woman on her marriage lost her own domicile and acquired that of her husband. *Merritt v. Merritt*, 385.

2. WIFE'S RIGHT TO ACQUIRE.

A wife may acquire and maintain a domicile separate from that of her husband. *Idem*.

See DIVORCE, 7.

EFFECT OF MARRIAGE. See DOMICILE, 1.

EFFECT OF REPEAL OF STATUTE. See MUNICIPAL CORPORATIONS, 4.

ELECTIONS.

1. MANDAMUS—NOMINATIONS—VACANCIES.

Stats. 1915, c. 285, sec. 44, the general election law, provides that, should a vacancy occur in the nominees for any office, it may be filled before election day by the committee to which such power has been delegated, and Stats. 1915, c. 283, regulating nominations for public office by primaries, conventions, petitions, etc., by section 26 provides that vacancies in nominations occurring after any party convention shall be filled by the party committee, etc. The Democratic county convention nominated a candidate for clerk and treasurer, and on his declination took

ELECTIONS—Continued.

no further action and left the place blank in the certificate of nomination, and adjourned without delegating any authority to its committee, but the executive board of the committee filed a certificate of nomination. *Held*, that the filing of such certificate was unauthorized, and that *mandamus* would issue to compel the county clerk to exclude from the ballots at a coming general election the name of the candidate contained in such certificate. *State v. Wilson*, 131.

EMBALMER'S LICENSE. See LICENSES, 1.

ENFORCEMENT OF LIENS. See JUSTICES OF THE PEACE, 3.

ESTABLISHMENT OF HOMESTEAD. See HOMESTEAD, 1.

ESTABLISHMENT OF ORPHANS' HOME "NEAR" A CITY. See CHARITIES, 2.

ESTATES. See CHARITIES, 1, 2, 3, 4, 5.

ESTATES IN ADMINISTRATION. See DESCENT AND DISTRIBUTION, 1, 2.

ESTOPPEL. See JUSTICES OF THE PEACE, 1; RELIGIOUS SOCIETIES, 1.

EVIDENCE.

1. CONTROL OF TESTIMONY BY PHYSICAL FACTS.

Physical facts will control testimony. *Carey v. Clark*, 151.

2. EXPERTS—ULTIMATE FACTS.

Where, because they are unknown, it is impossible to apply fixed natural laws to the solution of an issue, expert testimony may be considered as well as facts established by the testimony of other witnesses as the best means available of determining the truth. *McLeod v. Miller & Lux*, 447.

3. OPINION—EXTENT OF DAMAGE.

In an action for the overflow of plaintiff's ranch from defendants' dam, it was error to allow a witness to give his opinion as to the extent of the damage done; the proper method being to have the witness testify to the value of the ranch before and after the overflow. *Idem*.

4. OPINION—ULTIMATE FACT.

In an action for the overflow of plaintiff's ranch by defendants' dam, where nonexpert witnesses testified in detail to the facts as to previous overflows, and the location of various dams and ditches was minutely described by them, the opinions of such witnesses as to whether defendants' dam caused the overflow should have been excluded, as witnesses cannot testify to matters of ultimate fact, except where it is impossible for them to detail the evidentiary facts so as to enable the jury to draw a conclusion. *Idem*.

5. OPINIONS—ULTIMATE FACT—EXCLUSION.

Where, in an action for the overflow of plaintiff's ranch by defendant's dam, nonexpert witnesses testified in detail to the facts as to previous overflows, and the location of various dams and ditches was minutely described by them, the opinion

of such witnesses as to whether defendants' dam caused the overflow should have been excluded, since witnesses cannot testify to matters of ultimate fact, except where it is impossible for them to detail the evidentiary facts so as to enable the jury to draw a conclusion. *Idem*.

6. PHYSICAL LAW—REFUTATION.

Where the testimony of witnesses is refuted by physical law or matters of common knowledge, no probative force can be allowed such testimony. *Idem*.

See ANIMALS, 1; APPEAL AND ERROR, 6, 7, 9, 10, 11; ATTORNEY AND CLIENT, 2, 3; CRIMINAL LAW, 9, 10, 13, 14; DEPOSITIONS, 3, 4; DIVORCE, 4; GIFTS, 1; HOMESTEAD, 1; JUDGMENT, 2, 8; WILLS, 2.

EVIDENCE STATED IN INDICTMENT. See CRIMINAL LAW, 9.

EVIDENCE TO SUPPORT FINDINGS. See APPEAL AND ERROR, 7.

EXCEPTIONS. See APPEAL AND ERROR, 1; DEPOSITIONS, 3, 4.

EXCLUSION OF OPINION AS TO ULTIMATE FACT. See EVIDENCE, 5.

EXECUTORS AND ADMINISTRATORS. See LIMITATION OF ACTIONS, 3.

EXEMPTION. See TAXATION, 3.

EXEMPTION FROM FORCED SALE. See HOMESTEAD, 2.

EXPECTANCY. See HUSBAND AND WIFE, 1; TAXATION, 2.

EXPERTS. See EVIDENCE, 2, 4, 5.

EXTENT OF DAMAGE. See EVIDENCE, 3.

FACTS. See EVIDENCE, 5; TRIAL, 3.

FAILURE OF LEGISLATURE TO PROVIDE FOR APPEAL. See APPEAL AND ERROR, 12.

FAILURE TO DENY AFFIRMATIVE ANSWER. See PLEADING, 5.

FAILURE TO ESTABLISH ALLEGATIONS. See WATER AND WATERCOURSES, 1.

FAILURE TO OBJECT TO ANSWER. See QUIETING TITLE, 2.

FALSE PRETENSES. See CRIMINAL LAW, 5, 6, 7.

FEDERAL QUESTION. See COURTS, 1, 4.

FEDERAL SUPREME COURT. See COURTS, 1, 4.

FELONY. See CRIMINAL LAW, 5, 8.

FILING ASSIGNMENT OF ERRORS. See APPEAL AND ERROR, 2, 3, 5.

FILING COPY OF POINTS AND AUTHORITIES. See APPEAL AND ERROR, 4.

FILING COST BILL. See COSTS, 1.

FINAL JUDGMENT. See INSANE PERSONS, 2.

FINDINGS. See APPEAL AND ERROR, 6, 7.

FINDINGS ON CONFLICTING EVIDENCE. See APPEAL AND ERROR, 10.

FLOWAGE. See WATER AND WATERCOURSES, 2.

FORCED SALE. See HOMESTEAD, 2.

FORECLOSURE OF MECHANICS' LIENS. See MINES AND MINERALS, 2.

FOREIGN DECREE. See JUDGMENT, 2, 3, 8.

FOREIGN STATE. See DIVORCE, 1, 3, 5.

FORMER JUDGMENT. See JUDGMENT, 3, 4, 5, 7.

FRATERNAL ORDERS. See CHARITIES, 1, 3, 5.

FUNCTION OF MANDAMUS. See MANDAMUS, 1, 2, 3, 4, 5.

FUNDS. See MUNICIPAL CORPORATIONS, 1, 4.

FUTURE INJURY. See WATER AND WATERCOURSES, 3.

GARNISHMENT.

1. WRONGFUL GARNISHMENT—DAMAGES.

The assignee of a judgment may recover damages for the period a wrongful garnishment of it remained in force, although the judgment debtor on the day following such garnishment instituted interpleader proceedings and paid the money into court. *McIntosh v. Knox*, 403.

2. WRONGFUL GARNISHMENT—DAMAGES.

The assignee of a judgment wrongfully garnished may recover attorney's fees paid in interpleader proceedings instituted by the garnished judgment debtor. *Idem*.

3. WRONGFUL GARNISHMENT—LIABILITY.

The assignee of a judgment may recover damages for its wrongful garnishment in an action to which he is not a party without showing malice or suing on the attachment bond or under specific statutory authority. *Idem*.

See JUDGMENT, 1.

GENERAL FUND. See MUNICIPAL CORPORATIONS, 4.

GENERAL OBJECTIONS. See APPEAL AND ERROR, 9.

GIFTS.

1. LAND—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to quiet title to land occupied by a joss house held to show a gift of such land to a joss house society. *Su Lee v. Peck*, 20.

See PERPETUITIES, 1; RELIGIOUS SOCIETIES, 1, 2.

"GOES TO." See HUSBAND AND WIFE, 1.

GRAZING. See ANIMALS, 1, 2.

GROUNDS FOR DISBARMENT. See ATTORNEY AND CLIENT, 1, 2.

GROUNDS FOR REVIEW. See APPEAL AND ERROR, 8, 9.

GUARDIAN. See INSANE PERSONS, 1, 2.

HABEAS CORPUS. See CRIMINAL LAW, 7.

HARMLESS ERROR. See APPEAL AND ERROR, 11.

HARMONIZING PARTS OF ACT. See STATUTE, 1.

HEIRS. See DESCENT AND DISTRIBUTION, 1, 2.

"HELD." See HUSBAND AND WIFE, 1.

HOME "NEAR" A CITY. See CHARITIES, 2.

HOME "WORTHY OF ITS NAME." See CHARITIES, 1, 3.

HOMESTEAD.

1. ESTABLISHMENT—NOTICE TO THIRD PARTIES.

Occupancy by the family is *prima facie* evidence to third parties of the homestead nature of the premises. *First National Bank v. Meyers*, 284.

2. INTEREST OF WIFE—PROTECTION—"TO BE SELECTED."

Const., art. 4, sec. 30, declares that a homestead as provided by law shall be exempt from forced sale, and shall not be alienated without the joint consent of the husband and wife, and that laws shall be enacted providing for the recording of such homestead. Stats. 1864-65, c. 72, provides that a selected homestead shall be exempt from forced sale, and that the selection shall be made by recording intention in writing. Amending act, Stats. 1897, c. 20, provides that no deed or mortgage of a homestead, whether a declaration has been filed or not, shall be valid, unless both the husband and wife executed and acknowledged the same. *Held*, that although a homestead was not registered as required by law, the husband's sole conveyance or incumbrance of it did not affect the wife's right in the homestead, which could not be alienated unless the instrument was executed and given by both. *Idem*.

HOUSE OF ILL-FAME. See INTOXICATING LIQUORS, 1.

HUSBAND AND WIFE.

1. COMMUNITY PROPERTY—NATURE OF WIFE'S INTEREST—STATUTE—"HELD."

The use of the expression "goes to" the wife in Rev. Laws, 2165, different from the expression "belongs to" the husband in sec. 2164, does not show an intention of the legislature that the interest of the wife in the community should vest only after the husband's death, in view of Const., art. 4, sec. 31, requiring laws to be passed defining the rights of the wife to property held in common with her husband, since "held" does not convey the idea of mere expectancy, but imports ownership. *In Re Williams*, 241.

See HOMESTEAD, 2; MARRIAGE, 2; TAXATION, 2; TRIAL, 1.

ILLEGAL CONSIDERATION. See SALES, 1, 2.

ILLICIT COHABITATION. See MARRIAGE, 2.

ILLICIT OR MERETRICIOUS RELATIONSHIP. See TRIAL, 1.

IMPOSSIBILITY OF PERFORMANCE. See CONTRACTS, 1.

INCLUDED OFFENSES. See CRIMINAL LAW, 13.

INDEPENDENT ACTS. See WATER AND WATERCOURSES, 2.

INDICTMENT. See CRIMINAL LAW, 5, 7, 8, 9.

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 8, 9.

INDIVIDUAL JUDGMENT. See PARTNERSHIP, 1.

INFORMATION. See CRIMINAL LAW, 11, 12.

INHERITANCE TAX. See TAXATION, 2.

INJURIES. See MASTER AND SERVANT, 1.

INSANE PERSONS.

1. APPOINTMENT OF GUARDIAN—REVIEW—STAY OF PROCEEDINGS— UNDERTAKING ON APPEAL.

As procedure under Rev. Laws, 6162, is not a case provided for in civil practice act, secs. 404, 405, 408, and 409 (Rev. Laws, 5346, 5347, 5350, and 5351), the perfection of an appeal by giving the undertaking as prescribed by section 404 stays proceedings in the court below upon the judgment and order appealed from, under specific provision of Rev. Laws, 5355. *O'Donnell v. District Court*, 428.

2. APPOINTMENT OF GUARDIAN—RIGHT TO APPEAL.

Const., art. 6, sec. 4, vests the supreme court with appellate jurisdiction in all cases in equity. Rev. Laws, 4832, is to the same effect. Section 4833 empowers the supreme court to review on appeal a judgment in a proceeding commenced in a district court when the matter in dispute is embraced in the general jurisdiction of the supreme court. Section 5329 provides that an appeal may be taken from a final judgment or special proceeding commenced in the court in which the judgment is rendered. Section 6162 provides for petition for the appointment of a guardian for insane persons. *Held*, that such proceeding is equitable, and the judgment appointing the guardian for a mentally enfeebled person is final, so that an appeal lies. *Idem*.

INSTRUCTION AS TO COMMON-LAW MARRIAGE. See TRIAL, 1.

INSTRUCTIONS TO JURY. See CRIMINAL LAW, 13, 14.

INSTRUMENTS. See REFORMATION OF INSTRUMENTS, 1.

INTENT. See STATUTES, 2.

INTENTION OF TESTATOR. See CHARITIES, 2, 4, 5; WILLS, 1, 2, 3.

INTEREST OF DEFENDANT. See QUIETING TITLE, 1.

INTEREST OF WIFE. See HOMESTEAD, 2.

INTERPLEADER. See GARNISHMENT, 1, 2.

INTERPLEADER PROCEEDINGS. See JUDGMENT, 1.

INTOXICATING LIQUORS.

1. CONTRACTS—VALIDITY—NOTE FOR PRICE.

A note for balance of indebtedness for liquors sold and delivered to the maker, engaged in conducting a house of ill-fame within the restricted distance from a church, was not invalid, though the seller knew the liquors would be resold upon the premises; there being nothing unlawful in the sale nor any law prohibiting sale of liquors at such house, since the buyer had a license to sell liquor there. *Loose v. Larsen*, 157.

2. STATE LICENSES FOR CITY RETAIL SALES—DISPOSITION OF MONEY —“AMOUNT.”

Under Revenue Act of 1915 (Stats. 1915, c. 178), sec. 3, requiring persons disposing of liquor “in less quantities than a quart,” in a city, to take out a county license from the sheriff; section 6, requiring persons selling liquor either at retail or wholesale, in addition to other licenses, to take out a state license, section 8 providing for the sheriff, as ex officio collector, issuing and collecting for, a retail liquor license to one engaged in selling liquor in quantities less than five gallons, section 9, requiring one selling liquor in quantities in excess of five gallons to take out a wholesale state liquor license, section 10, providing that monthly the sheriff shall pay to the county treasurer “all” money received by him for state liquor licenses, “in like manner and form as is hereinafter provided for the payment of county license moneys,” and that in a county having a city therein he shall pay to it one-half of the “amount” of license moneys collected for disposition of liquors in less quantities than a quart, within its limits, half of the amount from state as well as county licenses for such disposition in quantities less than a quart is to be paid the city, and the balance only to the county treasurer, so that such half payable to the city is not included in “all moneys received” by the county treasurer for state liquor licenses “in accordance with the provisions of this act,” for which section 11 requires him to account to the state treasurer, the word “amount,” in section 10, referring to the total of two sums (citing Words and Phrases, Second Series, Amount). *State v. Hill*, 110.

JOINT CONSENT. See HOMESTEAD, 2.

JUDGMENT.

1. CONCLUSIVENESS.

Where a judgment debtor instituted interpleader proceedings upon being garnished, but the right of a claimant to recover attorney's fees was not made an issue nor decided in such suit, the question is not rendered *res judicata* so as to prevent recovery of such fees in an action by the claimant for the wrongful garnishment of such judgment. *McIntosh v. Knox*, 403.

2. FOREIGN DECREE—PLEADING AND PROOF.

While under Rev. Laws, 5070, the answer pleading as *res*

JUDGMENT—Continued.

judicata a judgment of a court of another state, denying divorce, as to which no presumption of regularity of proceedings obtains, need not plead the jurisdictional facts, yet, the reply denying the rendering of the judgment, they must be proven, except those admitted by the reply. *Danforth v. Danforth*, 435.

3. FOREIGN JUDGMENT—ACTIONS UPON.

While an action may be maintained in one state on a judgment or decree rendered in another, such judgment must be valid, and it will support no action where rendered against a nonresident, who was not served within the state and did not appear. *Keenan v. Keenan*, 351.

4. JUDGMENT AS BAR—QUESTION OF FACT.

The truth of a sufficiently alleged plea of former judgment affecting the same parties and the same subject-matter as involved in the present case was for the trial court, if the plea was denied. *Bernard v. Metropolis L. Co.*, 89.

5. PLEADING—RES ADJUDICATA.

In an action to restrain the diversion of water, allegations of defendant's affirmative answer setting forth the court, the jurisdiction, the subject-matter, and the scope and effect of a former action, plaintiff's connection with the subject-matter, the final judgment bearing upon and having to do with that matter, the common and general interest of plaintiff in that subject-matter, and his connection with the force and effect of the former judgment, was sufficient to constitute a proper pleading of former judgment affecting the parties. *Idem*.

6. PROCESS—SERVICE—VALIDITY.

Process cannot run beyond the borders of the state, and a constructive service by publication or personal service on a nonresident will not support a decree *in personam*, though it may support a decree affecting property within the state where process is issued. *Keenan v. Keenan*, 351.

7. RES ADJUDICATA.

Where plaintiff was a party to a former action, and the matter adjudicated therein was the same as that sought to be presently adjudicated, plaintiff is bound by the judgment in the former action, and cannot seek relief, against the successors to the beneficiaries of the former judgment inconsistent with it. *Bernard v. Metropolis L. Co.*, 89.

8. RES ADJUDICATA—NATURE OF LAW OF OTHER STATE—PLEADING AND PROOF.

If a judgment of another state, pleaded as *res judicata*, could under a rule of that state be merely one of nonsuit, which it could not be under the laws of this state, such rule must be pleaded and proven. *Danforth v. Danforth*, 435.

9. SERVICE OF PROCESS—SUBSTITUTED SERVICE.

A judgment on substituted service of summons is enforceable only on the property within the state out of which summons is issued. *Keenan v. Keenan*, 351.

See DIVORCE, 5; GARNISHMENT, 1, 2, 3; INSANE PERSONS, 2; MANDAMUS, 5.

JUDGMENT AGAINST PARTNERS. See PARTNERSHIP, 1.

JUDGMENT AS BAR. See JUDGMENT, 4, 7.

JUDGMENT IN FOREIGN STATE. See APPEAL AND ERROR, 11.

JURISDICTION. See COURTS, 2, 4; CRIMINAL LAW, 2, 3; DIVORCE, 5, 6, 7; INSANE PERSONS, 2; JUSTICES OF THE PEACE, 1, 2, 3; MANDAMUS, 2; PARTNERSHIP, 1; PROHIBITION, 1.

JUSTICES OF THE PEACE.

1. APPEAL—JURISDICTION—DISTRICT COURT—CONSENT.

Where the justice's court had no jurisdiction of a suit to enforce mechanics' liens wherein the aggregate amount involved exceeded \$300, but where the district court had original concurrent jurisdiction of the subject-matter, without such limitation as to amount, and where the defendant therein, after judgment for the plaintiff and the intervening claimants, appealed to the district court, where trial was had without any question being raised as to its jurisdiction, he was estopped to thereafter question the district court's jurisdiction on the ground that it had no greater jurisdiction on appeal than the justice's court. *Phillips v. Snowden Placer Co.*, 66.

2. APPEAL—JURISDICTION—JURISDICTION OF LOWER COURT.

The general rule is that the district court acquires no jurisdiction to try a cause on appeal from a justice's court, where the justice's court was without jurisdiction to entertain the case and render judgment therein. *Idem*.

3. LIENS — ENFORCEMENT — JURISDICTION — (CONSTITUTIONAL AND STATUTORY PROVISIONS—"SUM INVOLVED.")

Const. art. 6, sec. 8, enacted while Stats. 1861, c. 15, was in force in the territory, providing for the foreclosing of all liens in one action, requires the legislature to fix the powers of justices of the peace, and authorizes it to confer jurisdiction upon them, concurrent with the district courts, of actions to enforce mechanics' liens wherein the amount does not exceed \$300. Rev. Laws, 5714, is to the same effect, and section 2224 allows any number of lien claimants to join in the same action and the court to consolidate separate actions; and section 2227 provides that such liens may be enforced by an action in any court of competent jurisdiction, and, as amended by Stats. 1907, c. 90, applies to mechanic's lien proceedings in justice's court where the sum involved does not exceed \$300. *Held*, that the words "sum involved" mean the sum involved in the several liens embraced in a suit, and that a justice's court had no jurisdiction of an action to foreclose mechanics' liens, where the total amount of the liens exceeds \$300, notwithstanding each of the liens is for a less amount. *Idem*.

See CRIMINAL LAW, 1, 2, 3, 4; MINES AND MINERALS, 2.

LABOR. See QUANTUM MERUIT, 1.

LAND. See GIFTS, 1.

LAND CONVEYED. See BOUNDARIES, 1.

LATE FILING. See APPEAL AND ERROR, 2, 3, 5.

LEGAL EXCEPTIONS. See DEPOSITIONS, 3, 4.

LEGALITY OF LICENSE TAX. See CRIMINAL LAW, 2.

LEGATEES. See CHARITIES, 3.

LEGISLATIVE INTENT. See STATUTES, 2.

LEGISLATURE. See MUNICIPAL CORPORATIONS, 1, 2.

LIABILITY. See MECHANICS' LIENS, 1; MINES AND MINERALS, 1.

LIABILITY FOR INDEPENDENT ACTS. See WATER AND WATER-COURSES, 2.

LIABILITY FOR REFUSAL TO TRANSFER STOCK. See TROVER AND CONVERSION, 1.

LICENSE TAX ON ATTORNEYS. See CRIMINAL LAW, 2, 3.

LICENSES.

1. EMBALMER'S LICENSE—"SHALL."

As used in act approved February 20, 1909 (Rev. Laws, 4453), section 9, providing that the state board of embalmers shall recognize licenses issued in another state, and on presentation thereof shall issue the regular license to the holders, the word "shall" is not equivalent to "may," but is mandatory. *Eddy v. Board of Embalmers*, 329.

See INTOXICATING LIQUORS, 2.

LIENS. See JUSTICES OF THE PEACE, 1, 3; MECHANICS' LIENS, 1; MINES AND MINERALS, 1, 2.

LIMIT OF LEGISLATION. See CONSTITUTIONAL LAW, 3.

LIMITATION OF ACTIONS.

1. BAR AGAINST TRUSTEE—RIGHT OF CESTUI QUE TRUST.

Whenever a right of action in a trustee with the legal title is barred by limitations, the right of the *cestui que* trust is also barred, but, if the legal title in the *cestui que* trust, the statute of limitations which might run against the trustee will not constitute a bar against the *cestui* if he be under disability. *Wren v. Dixon*, 172.

2. MINING CLAIM—NOTICE—INFERENCE.

Minor heirs of one who had duly patented mining claim were entitled to notice of the hostile character of defendant's possession, which notice could not be given them until they were capable in law of receiving it: so that, under the statute (Rev. Laws, 4951, *et seq.*) they might commence an action to recover it within two years after majority, when they were chargeable with notice. *Idem*, 173.

3. PERSONAL REPRESENTATIVE—STATUTE.

Under Rev. Laws, 5911, providing that every person to whom letters testamentary or of administration shall have issued shall execute a bond with a penalty not less than the value of the

personal property, including rents and profits, and may be required to give an additional bond whenever the sale of realty is ordered, the relationship of trustee and *cestui que* trust between the executor or administrators and the heirs is not created in so far as the same might apply to the realty of an estate, so that the rule that a statute of limitations running against a trustee holding the legal title to realty runs also against the *cestui* does not apply. *Idem*, 172.

4. SERVICES OF ATTORNEY.

Where, by an attorney's contract, he was entitled to \$100 per year for general legal services, he had a cause of action for each year's services so rendered, and recovery by him for more than four years prior to action was barred. *Warren v. Glasgow Exploration Co.*, 103.

5. STATUTES—CONSTRUCTION.

The statute of limitations, like any other statute, is to be construed according to the manifest intention of the legislature, and, in ascertaining such intention, the language used should be construed, if possible, according to the usual meaning of the words used. *Wren v. Dixon*, 172.

6. TAX TITLE—ACTION TO DETERMINE—STATUTES.

Rev. Laws, 4946, provides that civil actions can only be commenced within the periods prescribed in the act, after the cause of action has accrued, except where different limitation is prescribed by statute. Section 4951 provides that no action to recover a mining claim shall be maintained unless plaintiff was seized or possessed thereof within two years before the commencement of such action, defining occupation and adverse possession, and extending the provisions of the act applicable to other real estate to mining claims, provided that in such application "two years" shall be intended when "five years" is used, and section 4952 provides that no cause of action to recover real property shall be effectual, unless the person prosecuting the action was seized or possessed of the premises within "five years" before action was commenced, and section 4966 provides that, if one entitled to commence an action to recover real property shall be a minor, the time of disability is no part of the time limited for the commencement of such actions, which may be commenced within two years after the removal of disability. *Held* that, by interpolation, section 4951 was to be read as if providing that, if a person to whom an action to recover a mining claim accrues is a minor, the period of disability shall not be part of the time limited for the commencement of such action, which may be commenced within two years after the disability ceases. *Idem*, 171.

LIQUORS. See INTOXICATING LIQUORS, 1, 2.

MANDAMUS.

1. FUNCTION OF WRIT.

Mandamus will lie to compel a certain prescribed duty to be assumed by a tribunal, board, or officer, but will not operate beyond a point where that tribunal, board, or officer has the right to exercise discretion. *State v. District Court*, 163.

MANDAMUS—Continued.

2. REMEDY BY APPEAL—REFUSING REMOVAL OF ADMINISTRATOR.

Where a petition was presented in the district court for removal of an administrator, setting up his alleged wrongful acts, and, after hearing both petitioner and respondent, decision was rendered dismissing the petition, such action was not reviewable by *mandamus*, since the court exercised jurisdiction and discretion in hearing and deciding the case and petitioner had a plain, speedy, and adequate remedy at law by appeal from such decision under Rev. Laws, 6112, providing for appeal from decisions in probate matters. *Idem*.

3. SCOPE—REMEDY BY WRIT OF ERROR.

Writ of *mandamus* will not assume the function of a writ of error, nor will it serve to require an inferior tribunal to act in any particular manner or to enter any particular judgment or order. *Idem*.

4. WORKMEN'S COMPENSATION—AWARD.

Mandamus is not the proper remedy to compel the Industrial Commission to award an injured workman compensation, under Stats. 1913, c. 111, as amended by Stats. 1915, c. 190, since such workman has a speedy and adequate remedy at law in an action at law against the commission. *State v. Nevada Industrial Commission*, 220.

5. WORKMEN'S COMPENSATION—PAYMENT OF JUDGMENT.

Mandamus is an appropriate remedy to compel the Industrial Commission to pay a final judgment of compensation obtained by an injured workman in an action at law against the commission, where it refuses to pay such final judgment. *Idem*.

See ELECTIONS, 1.

MARRIAGE.

1. COMMON-LAW MARRIAGE.

As the common law prevails in Nevada with reference to the marriage relation, that relation may be formed by words of present assent, and without the interposition of any person lawfully authorized to solemnize marriage, or to join persons in marriage. *Parker v. De Bernardi*, 361.

2. COMMON-LAW MARRIAGE—PRESUMPTIONS AND BURDEN OF PROOF.

Where cohabitation between man and woman was illicit in the beginning, though burden of proof is upon those asserting a valid marriage, there is no presumption that the relationship continued to be illicit, it being a matter of proof, and not of presumption, and a valid marriage under the common law may be shown by proof that the parties sustained toward each other the relation of husband and wife after the impediment to their marriage had been removed; the only presumption to be indulged in being in favor of a valid marriage, which may be based on continuous cohabitation alone. *Idem*.

3. COMMON-LAW MARRIAGE—QUESTION FOR JURY.

While prostitution or immorality might militate against the presumption of a legitimate common-law marriage, such facts are for the jury to consider under proper instructions, since, even though the woman were a prostitute, if a marriage of the highest and most sacramental order had been performed between

the parties, it would have had no more blinding effect than a common-law marriage *per verba de presenti*, actually consummated. *Idem*.

See DOMICILE, 1; TRIAL, 1.

MASTER AND SERVANT.

1. PERSONAL INJURIES—WORKMEN'S COMPENSATION LAW—RELEASE—VALIDITY.

Under Workmen's Compensation Act (Act of March 24, 1911, Stats. 1911, c. 183), section 11, allowing workmen to elect any other remedy at law, where a servant, a citizen and resident of California, executed in California a full and fair release of his master from liability for injuries received in his employment in Nevada, which was valid in California, it was a valid defense to action by him in Nevada for such injuries, notwithstanding Rev. Laws, 5652, providing that no acceptance of any insurance, relief benefit, or indemnity by the person entitled thereto shall constitute any bar to any personal injury action, for, the cause of action being transitory, and being completely barred in California, it was completely extinguished everywhere. *Leach v. Mason Valley M. Co.*, 143.

MATERIAL ISSUE. See APPEAL AND ERROR, 6.

MATRIMONIAL DOMICILE. See DIVORCE, 7.

MAYHEM. See CRIMINAL LAW, 10, 11, 12, 13, 14, 15.

MECHANICS' LIENS.

1. NOTICE REPUDIATING LIABILITY—STATUTES.

Rev. Laws, 2213, provides for a lien, whether work is done or material furnished at the instance of the owner or his agent, and that every contractor, subcontractor, architect, builder, etc., in control shall be held to be the owner's agent. Section 2221 provides that every building or other improvement constructed with the knowledge of the owner shall be held to have been constructed at his instance, and his interest shall be subject to lien, unless within three days after he shall have obtained knowledge of the construction he shall give notice that he will not be responsible, by posting notice in writing on the land or building. Alterations were made on a building, and the contractors for the work with the owner ordered lumber. After work had been commenced, the owners posted a notice of nonliability. *Held*, that such notice could not affect the lien under section 2213, since section 2221 merely imposes an active duty upon the owner to repudiate liability for improvements made or materials furnished without his consent, and not to the case where the order is given by his agent. *Verdi Lumber Co. v. Bartlett*, 317.

See JUSTICES OF THE PEACE, 1, 3; MINES AND MINERALS, 1, 2.

MEMORANDUM OF ERRORS. See APPEAL AND ERROR, 2.

MINES AND MINERALS.

1. MECHANICS' LIENS—POSTING OF NOTICES—SUFFICIENCY—STATUTE.

Under Rev. Laws, 2221, providing that an improvement on land with the owner's knowledge shall subject the owner to a

MINES AND MINERALS—Continued.

then unless, within three days after his knowledge of the improvement, he gives notice that he will not be responsible therefor by posting a notice in writing to that effect in some conspicuous place upon the land, etc., a notice posted at the collar of a mine shaft, which the owner, when he entered into an agreement with the contractor, knew would necessarily be destroyed in preparing the shaft for mining operations, and which was so destroyed prior to the contractor's employment of the claimants, was not binding upon the claimants, as a notice must be so posted as, under ordinary conditions, it will remain a reasonable length of time, though a written notice in lead pencil would be as good as any other notice. *Phillips v. Snowden Placer Co.*, 67.

2. MECHANICS' LIENS—PROCEEDINGS—COSTS.

In a suit to foreclose mechanics' liens for work done under a contractor for mining work, brought in a justice's court, the allowance of costs to the plaintiff and intervening claimants in that court was erroneous. *Idem*.

3. RECOVERY OF MINING CLAIMS—STATUTES.

Under Act of Congress July 26, 1866, c. 262, 14 Stat. 252, providing for the patenting of mining claims, Rev. Laws, sec. 4951, providing that no action to recover mining claims shall be maintained unless plaintiff or those under whom he claims was seized or possessed of such claim within two years before the commencement of such action, and section 4952, providing that no cause of action upon title to real property shall be effectual unless the person prosecuting the action was seized or possessed of the premises in question within five years before the commission of the act in respect to which the action is prosecuted, and section 4953, referring to mining claims as such, enacted subsequent to the federal statute, applied to patented as well as unpatented mining claims, and an action to recover a patented claim must be commenced within two years from the time when plaintiff was seized or possessed of such claim. *Wren v. Dixon*, 172.

See CONSTITUTIONAL LAW, 4; CONTRACTS, 1; COURTS, 4; LIMITATION OF ACTIONS, 2, 6; TAXATION, 1, 3.

MINIMUM SENTENCE. See CRIMINAL LAW, 15.

MINING CLAIM. See LIMITATION OF ACTIONS, 2, 6.

MINOR HEIRS. See LIMITATION OF ACTIONS, 2, 6.

MISCONDUCT OF ATTORNEY. See ATTORNEY AND CLIENT, 1, 2.

MISDEMEANOR. See CRIMINAL LAW, 5, 6, 8.

MISTAKE. See CONTRACTS, 1.

MONUMENT. See BOUNDARIES, 1.

"MONUMENT." See CHARITIES, 4.

MORTGAGE OF HOMESTEAD. See HOMESTEAD, 2.

MOTION TO STRIKE ASSIGNMENT OF ERRORS. See APPEAL AND ERROR, 2.

MOTIVE OF LEGISLATURE. See CONSTITUTIONAL LAW, 5.

MUNICIPAL CORPORATIONS.

1. FUNDS—CONTROL BY LEGISLATURE.

The revenues of a city raised by taxation, though levied for specific public purposes, may be applied by the legislature to other municipal uses, subject to constitutional limitations. *City of Reno v. Stoddard*, 537.

2. NATURE OF POWERS—CONTROL BY LEGISLATURE.

Cities are mere instrumentalities of the state for the convenient administration of government, and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature. *Idem*.

3. REPEAL—OMISSION IN AMENDING ACT.

Stats. 1915, c. 184, sec. 5, amending charter of city of Reno of March 16, 1903 (Stats. 1903, c. 102, as amended by Stats. 1905, c. 71) art. 12, sec. 10, by empowering the city council to levy and collect for general purposes a certain tax on the assessed value of real and personal property, 15 per cent of which should be set aside in a special fund to provide for a sewage-disposal plant or system for the city, was, as to such special fund, repealed by Stats. 1917, c. 76, amending section 5 "to read as follows," and omitting the provision for such special fund. *Idem*.

4. SPECIAL FUND—REPEAL OF STATUTE—EFFECT.

The provision of the last amendatory act that all moneys held in any special fund might be transferred to the city's general fund authorized the transfer of the special sewage-disposal fund created by Stats. 1915, c. 184, sec. 5, to the city's general fund. *Idem*.

MUNICIPAL COURT. See CRIMINAL LAW, 2, 3, 4.

MUNICIPAL ORDINANCE. See CRIMINAL LAW, 2, 3.

NATURAL LAWS. See EVIDENCE, 2, 6.

NATURE OF LAW OF OTHER STATE. See JUDGMENT, 8.

NATURE OF POWERS. See MUNICIPAL CORPORATIONS, 2.

"NEAR." See CHARITIES, 2.

NECESSITY OF ANSWER. See DIVORCE, 2.

NOMINATIONS. See ELECTIONS, 1.

NONSUIT. See DISMISSAL AND NONSUIT, 1, 2, 3; TRIAL, 3.

NOTICE OF ADVERSE POSSESSION. See LIMITATION OF ACTIONS, 2.

NOTICE OF APPEAL. See CRIMINAL LAW, 1.

NOTICE REPUDIATING LIABILITY. See MECHANICS' LIENS, 1.

NOTICE TO THIRD PARTIES. See HOMESTEAD, 1.

NOTICES. See MINES AND MINERALS, 1.

OBJECTION BY PARTY TAKING. See DEPOSITIONS, 3, 4.

OBJECTION IN LOWER COURT. See QUIETING TITLE, 2, 3.

OBTAINING MONEY UNDER FALSE PRETENSES. See CRIMINAL LAW, 5, 6, 7.

OCCUPANCY. See HOMESTEAD, 1.

OFFENSE. See CRIMINAL LAW, 8.

OFFICER OF CORPORATION. See CRIMINAL LAW, 5.

OMISSION IN AMENDING ACT. See MUNICIPAL CORPORATIONS, 3.

OPINION. See EVIDENCE, 3, 4.

OPINION EVIDENCE. See EVIDENCE, 5.

OPPORTUNITY TO AMEND COMPLAINT. See APPEAL AND ERROR, 8, 11.

ORPHANS' HOME. See CHARITIES, 1.

OVERFLOW. See EVIDENCE, 3, 4, 5, 6; WATER AND WATERCOURSES, 2, 3.

OWNERSHIP. See HUSBAND AND WIFE, 1; TROVER AND CONVERSION, 1.

OWNERS' AGENT. See MECHANICS' LIENS, 1.

PARI MATERIA. See STATUTES, 1.

PARTNERSHIP.

1. ACTIONS AGAINST PARTNERS — CHARACTER OF JUDGMENT — INDIVIDUAL JUDGMENT.

Under Rev. Laws, 5239, providing that judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, and section 5240, providing that, in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper. In an action against partners, the court did not exceed its jurisdiction by rendering judgment against one of them. *Conicay v. District Court*, 395.

PARTY CONVENTION. See ELECTIONS, 1.

PATENTED MINING CLAIMS. See CONSTITUTIONAL LAW, 4; COURTS, 4; TAXATION, 1, 3.

PAYMENT OF JUDGMENT. See MANDAMUS, 5.

PENALTY FOR REFUSAL TO ANSWER QUESTIONS. See DEPOSITIONS, 1, 2.

PERFORMANCE. See CONTRACTS, 1.

PERFORMANCE OF CONDITION. See CHARITIES, 2.

PERMANENT DISFIGUREMENT. See CRIMINAL LAW, 10, 11, 12, 13, 14.

"PERMANENT MONUMENT." See BOUNDARIES, 1.

PERPETUITIES.

1. CHARITABLE GIFT—"PUBLIC CHARITY."

A bequest of the income of the residue of an estate to a fraternal order if the order established an orphans' home as provided therein, did not violate the common-law rule against perpetuities, such home being a public charity, since its use was not confined to any privileged or special class of orphans. *In Re Hartung*, 262.

PERSONAL INJURIES. See MASTER AND SERVANT, 1.

PERSONAL REPRESENTATIVE. See LIMITATION OF ACTIONS, 3.

PERSONAL SERVICE. See JUDGMENT, 6, 9.

PHYSICAL FACTS. See EVIDENCE, 1, 6.

PIOUS USES. See RELIGIOUS SOCIETIES, 2.

PLEADING.

1. AMENDMENT—PRAYER.

Under Rev. Laws, 5081, providing that where the variance is not material, a finding according to the evidence or an immediate amendment may be ordered, amendment of prayer of the complaint may be allowed at conclusion of plaintiff's case. *Miller v. Thompson*, 35.

2. DEMURRER.

A demurrer may be made to a whole pleading, or to the statement of any of the grounds embodied therein. *Bernard v. Metropolis L. C.*, 89.

3. DEMURRER—DEMURRER TO WHOLE PLEADING PARTIALLY GOOD.

Where a demurrer is filed to the whole pleading, it may be overruled if any of the statements are held to be good in furtherance of the purpose of the pleading, whether establishing a cause of action or interposing a defense; the rule applying not only as to a complaint, but equally to an answer and its affirmative allegations. *Idem*.

4. DEMURRER TO ENTIRE PLEA OR ANSWER—GOOD SEPARABLE PART.

A demurrer directed to an entire plea or entire answer, which plea or answer contains several separable parts, must be overruled if any of the parts is in itself good. *Idem*.

5. FAILURE TO DENY AFFIRMATIVE ANSWER—ADMISSION—STATUTE.

Under Stats. 1915, c. 158, providing that each material allegation of new matter in the answer, uncontroverted by the reply, must be taken as true, an allegation of the answer, undenied by the replication, must be taken as true. *Idem*.

See ANIMALS, 2; DEPOSITIONS, 1, 2; JUDGMENT, 5; QUANTUM MERUIT, 1.

PLEADING AND PROOF. See JUDGMENT, 2, 8.

PLEADING BY DEFENDANT IN JUSTICE'S COURT. See CRIMINAL LAW, 4.

POLICY OF LEGISLATURE. See CONSTITUTIONAL LAW, 5.

POSITIVE CONSTITUTIONAL INHIBITION. See CONSTITUTIONAL LAW, 7.

POSSESSION. See MINES AND MINERALS, 3.

POSTING OF NOTICES. See MINES AND MINERALS, 1.

POWER OF COURT. See CONSTITUTIONAL LAW, 5.

POWERS OF MUNICIPAL CORPORATIONS. See MUNICIPAL CORPORATIONS, 2.

PRAYER. See PLEADING, 1.

PREJUDICE. See CRIMINAL LAW, 14.

PRESUMPTION AS TO JURISDICTION. See COURTS, 2, 3.

PRESUMPTIONS AND BURDEN OF PROOF. See MARRIAGE, 2, 3.

PRIMA FACIE EVIDENCE. See HOMESTEAD, 1.

PRIMARY ELECTIONS. See ELECTIONS, 1.

PRIOR APPROPRIATION. See WATER AND WATERCOURSES, 1.

PROBATE. See MANDAMUS, 2.

PROCEEDINGS FOR DISBARMENT. See ATTORNEY AND CLIENT, 2, 3.

PROCESS. See JUDGMENT, 6, 9.

PROHIBITION.

1. RIGHT TO REMEDY.

Where a stay of proceedings is had, and the court undertakes to exercise an unauthorized jurisdiction pending the stay, prohibition is the proper remedy. *O'Donnell v. District Court*, 428.

PROHIBITORY PROVISIONS. See CONSTITUTIONAL LAW, 6.

PROMISSORY NOTE. See INTOXICATING LIQUORS, 1.

PROOF. See MARRIAGE, 2; REFORMATION OF INSTRUMENTS, 1; TRIAL, 1.

PROOF AND VARIANCE. See QUANTUM MERUIT, 1.

PROPERTY. See RELIGIOUS SOCIETIES, 2; TAXATION, 2; TRIAL, 1.

PROPHECY AS TO FUTURE INJURY. See WATER AND WATERCOURSES, 3.

PROSTITUTION. See MARRIAGE, 3.

PROTECTION OF INTEREST OF WIFE. See HOMESTEAD, 2.

PROVINCE OF COURT. See TRIAL, 2.

"PUBLIC CHARITY." See PERPETUITIES, 1.

QUANTUM MERUIT.

1. WORK AND LABOR—PLEADING—PROOF AND VARIANCE.

Under a complaint on *quantum meruit* for services, where a specified contract is proved fixing the price therefor, the stipulated price becomes the *quantum meruit* in the case. *Warren v. Glasgow Exploration Co.*, 103.

QUESTION OF FACT. See JUDGMENT, 4; TRIAL, 3.

QUESTIONS IN DEPOSITION. See DEPOSITIONS, 1, 2.

QUIETING TITLE.

1. COMPLAINT—INTEREST OF DEFENDANT.

Neither under Rev. Laws, 5514, nor independently of it, does a complaint state a cause of action to quiet title, if not alleging that defendants claim an interest in the property adverse to plaintiffs. *Clay v. Scheeline B. & T. Co.*, 9.

2. OBJECTION IN LOWER COURT—ANSWER—EFFECT OF FAILURE TO OBJECT.

Plaintiffs, not having, till after judgment, questioned that the answer stated a defense to the matter pleaded in the complaint, cannot on appeal urge failure of defendants to demur to the complaint, as not stating a cause of action, and to deny certain of its allegations, as ground for reversing the judgment and ordering one for plaintiffs; as a demurrer to an answer which does not aid the complaint will be sustained to the defective complaint. *Idem*.

3. OBJECTION NOT MADE BELOW—SUFFICIENCY OF COMPLAINT.

The complaint, though praying that title be quieted against defendant, not containing the necessary allegation of a complaint to quiet title, that defendants claim an interest in the property adverse to plaintiffs, but alleging that defendants were endeavoring to cloud and cast a cloud on said property, and the evidence being such as would be offered in an action to prevent a cloud being cast on plaintiffs' title, defendants were entitled to assume that the action was brought merely to prevent a cloud, as regards the contention that, because defendants did not urge in the trial court that the complaint did not state a cause of action to quiet title, they cannot do so on appeal, and that therefore the judgment should be reversed, and one quieting title in plaintiffs be ordered for want of denials in the answer. *Idem*.

See COURTS, 4; DEEDS, 1; GIFTS, 1; REFORMATION OF INSTRUMENTS, 1.

READING BY OPPOSITE PARTY. See DEPOSITIONS, 3, 4.

REAL PROPERTY. See DESCENT AND DISTRIBUTION, 1, 2; GIFTS, 1; TRIAL, 1.

RECORDING. See HOMESTEAD, 2.

RECOVERY OF MINING CLAIMS. See MINES AND MINERALS, 3.

REFORMATION OF AGREEMENT. See DEEDS, 1.

REFORMATION OF INSTRUMENTS.

1. BURDEN OF PROOF.

In suit to quiet title against defendant claiming under a conveyance which he prayed to have reformed to comply with plaintiff's agreement to convey, alleged in the answer, the burden of proof was on the defendant to establish his contention as to the description of the property intended to be conveyed by virtue of the original agreement. *Carey v. Clark*, 151.

REFUSAL TO ANSWER. See DEPOSITIONS, 1, 2.

REFUSAL TO TRANSFER STOCK. See TROVER AND CONVERSION, 1.

REFUSING REMOVAL OF ADMINISTRATOR. See MANDAMUS, 2.

REFUTATION OF WITNESS BY PHYSICAL LAWS. See EVIDENCE, 6.

RELEASE FROM LIABILITY. See MASTER AND SERVANT, 1.

RELIEF BY HABEAS CORPUS. See CRIMINAL LAW, 7.

RELIGIOUS SOCIETIES.

1. GIFT—CAPACITY TO TAKE—ESTOPPEL.

Where a lot was given to a joss house society in consideration that the Chinese inhabitants would locate in the vicinity of the lot, and of the society's improvements on the lot, the donor and his grantee are estopped from asserting the society's incapacity to take title to the lot. *Su Lee v. Peck*, 20.

2. PROPERTY—CAPACITY TO TAKE GIFT.

An unincorporated joss house society can take title to real estate in this state under the common-law rule that land may be given to pious uses before there is a grantee competent to take, and that, in the meantime, the fee lies in abeyance and vests when the grantee exists. *Idem*.

REMEDY BY APPEAL. See MANDAMUS, 2.

REMEDY BY WRIT OF ERROR. See MANDAMUS, 3.

REMEDY FOR INJURIES. See MASTER AND SERVANT, 1.

REPEAL. See STATUTES, 1.

REPEAL OF STATUTES. See CONSTITUTIONAL LAW, 3; MUNICIPAL CORPORATIONS, 3, 4.

RES ADJUDICATA. See JUDGMENT, 1, 2, 4, 5, 7, 8.

RESIDENCE. See DIVORCE, 4, 6, 7.

RETAIL SALES. See INTOXICATING LIQUORS, 2.

REVENUES OF CITY. See MUNICIPAL CORPORATIONS, 1, 4.

REVIEW OF APPOINTMENT OF GUARDIAN. See INSANE PERSONS, 1, 2.

REVIEW OF RULINGS UPON EVIDENCE. See APPEAL AND ERROR, 9.

RIGHT OF APPEAL. See APPEAL AND ERROR, 12; INSANE PERSONS, 2.

RIGHT OF CESTUI QUE TRUST. See LIMITATION OF ACTIONS, 1, 3.

RIGHT OF HEIRS. See DESCENT AND DISTRIBUTION, 1, 2.

RIGHT TO WRIT OF PROHIBITION. See PROHIBITION, 1.

RULES OF SUPREME COURT. See APPEAL AND ERROR, 4.

SALE. See HOMESTEAD, 2; TAXATION, 1.

SALES.

1. ILLEGAL CONSIDERATION.

Generally where the vendor of goods merely has knowledge that the purchaser intends to use them for an immoral or illegal purpose, and does nothing to aid in carrying out such purpose, he is entitled to recover therefor. *Loose v. Larsen*, 157.

2. ILLEGAL CONSIDERATION.

Generally where goods are sold for the express purpose of enabling the buyer to accomplish an unlawful or immoral purpose, there can be no recovery for their price. *Idem*.

SCOPE OF MANDAMUS. See MANDAMUS, 3, 4, 5.

SELECTION OF HOMESTEAD. See HOMESTEAD, 2.

SELF-EXECUTING PROVISIONS. See CONSTITUTIONAL LAW, 4, 6, 7.

SENTENCE. See CRIMINAL LAW, 15.

SEPARABLE PART OF DEMURRER. See PLEADING, 4.

SEPARATE DOMICILE. See DIVORCE, 7; DOMICILE, 1, 2.

SERVICE BY PUBLICATION. See JUDGMENT, 6, 9.

SERVICE OF PROCESS. See JUDGMENT, 6, 9.

SERVING COPY OF POINTS AND AUTHORITIES. See APPEAL AND ERROR, 4.

SERVING COPY OF TRANSCRIPT. See APPEAL AND ERROR, 4.

SERVING MEMORANDUM OF ERRORS. See APPEAL AND ERROR, 2.

SERVICES OF ATTORNEY. See LIMITATION OF ACTIONS, 4.

"SHALL." See LICENSES, 1.

SIGNATURE. See **WILLS**, 2, 3.

"SLIT." See **CRIMINAL LAW**, 12.

SOLEMNIZATION OF MARRIAGE. See **MARRIAGE**, 1.

SPECIAL DAMAGE. See **ANIMALS**, 2.

SPECIAL FUND. See **MUNICIPAL CORPORATIONS**, 4.

SPECIAL PROCEEDING. See **INSANE PERSONS**, 2.

SPECIFIED CONTRACT. See **QUANTUM MERUIT**, 1.

STATE LICENSES. See **INTOXICATING LIQUORS**, 2.

STATEMENT OF OFFENSE. See **CRIMINAL LAW**, 8.

STATUTES.

1. **CONSTRUCTION—HARMONIZING PARTS OF ACT.**

Instead of construing one section of an act as repealing another section in part, courts rather seek to harmonize the different parts of the act, or different acts in *pari materia*, so as to enable them all to stand. *Verdt Lumber Co. v. Bartlett*, 317.

2. **CONSTRUCTION—LEGISLATIVE INTENT.**

The unambiguous language of a statute cannot be construed contrary to its clear meaning. *Eddy v. Board of Embalmers*, 329.

See **APPEAL AND ERROR**, 2, 3, 5, 12; **CONSTITUTIONAL LAW**, 3, 4; **CONTRACTS**, 1; **COSTS**, 2; **CRIMINAL LAW**, 1, 2, 5, 6, 9, 11, 12, 13, 14; **DEPOSITIONS**, 3, 4; **DESCENT AND DISTRIBUTION**, 2; **DISMISSAL AND NONSUIT**, 2; **DIVORCE**, 3, 6, 7; **ELECTIONS**, 1; **HOMESTEAD**, 2; **HUSBAND AND WIFE**, 1; **INSANE PERSONS**, 1, 2; **INTOXICATING LIQUORS**, 2; **JUDGMENT**, 2, 3; **LICENSES**, 1; **LIMITATION OF ACTIONS**, 2, 3, 5, 6; **MANDAMUS**, 2, 4; **MASTER AND SERVANT**, 1; **MECHANICS' LIENS**, 1; **MINES AND MINERALS**, 1, 3; **MUNICIPAL CORPORATIONS**, 1, 2, 3, 4; **PARTNERSHIP**, 1; **PLEADING**, 1, 5; **QUIETING TITLE**, 1; **TAXATION**, 1, 2, 3; **WILLS**, 3.

STAY OF PROCEEDINGS. See **INSANE PERSONS**, 1.

STIPULATED PRICE. See **QUANTUM MERUIT**, 1.

STRIKING ASSIGNMENT OF ERRORS. See **APPEAL AND ERROR**, 2.

STRIKING COMPLAINT. See **DEPOSITIONS**, 1, 2.

STOCK TRANSFER. See **TROVER AND CONVERSION**, 1.

SUBSTANTIAL CONFLICT. See **APPEAL AND ERROR**, 6.

SUBSTANTIAL EVIDENCE. See **APPEAL AND ERROR**, 6, 10.

SUBSTITUTED SERVICE. See **JUDGMENT**, 9.

SUFFICIENCY OF COMPLAINT. See **QUIETING TITLE**, 3.

SUFFICIENCY OF EVIDENCE. See **ATTORNEY AND CLIENT**, 2, 3; **CRIMINAL LAW**, 10; **GIFTS**, 20; **WILLS**, 2.

SUFFICIENCY OF INFORMATION. See **CRIMINAL LAW**, 11, 12.

SUFFICIENCY OF NOTICE. See **MINES AND MINERALS**, 1.

SUFFICIENCY OF NOTICE OF APPEAL. See **CRIMINAL LAW**, 1.

SUFFICIENCY OF OBJECTION. See **APPEAL AND ERROR**, 9.

SUFFICIENCY OF PERFORMANCE OF CONDITION. See **CHARITIES**, 2.

"SUM INVOLVED." See **JUSTICES OF THE PEACE**, 3.

SUPREME COURT RULES. See **APPEAL AND ERROR**, 4.

SUPREME COURT, UNITED STATES. See **COURTS**, 1, 4.

SURPLUSAGE IN INDICTMENT. See **CRIMINAL LAW**, 9.

TAX, ASSESSMENT OR MUNICIPAL FINE. See **CRIMINAL LAW**, 2, 3.

TAX SALE. See **COURTS**, 4; **TAXATION**, 1.

TAX TITLE. See **LIMITATION OF ACTIONS**, 6.

TAXATION.

1. ASSESSMENT—TAX SALE—VALIDITY.

Where an assessment on a patented mining claim at \$10 per acre under Stats. 1905, c. 58, expressly following Const. art. 10, sec. 1, as amended in 1902 (Stats. 1901, p. 136), was void under the amendment of that section in 1906 (Stats. 1907, p. 501), providing for an assessment of such claims at \$500, with certain exceptions as to labor performed, etc., the tax sale under the assessment was void. *Wren v. Diron*, 170.

2. INHERITANCE TAX—COMMUNITY PROPERTY—INTEREST OF WIFE.

Under Rev. Laws, 2156, defining community property, and section 2165, providing that upon the death of the husband one-half of the community property goes to the surviving wife, the right of the wife in the community property during her husband's life is not a mere expectancy, but is a property interest, though subject to the husband's control, and at the husband's death it is merely freed from his control, and does not pass under the inheritance laws, and therefore is not subject to taxation under Stats. 1913, c. 266, sec. 1, imposing a tax on all property passing by will or statutes of inheritance. *In Re Williams*, 241.

3. MINES AND MINERALS—CONSTITUTIONAL PROVISIONS.

Under Const. art. 10, sec. 1, as amended in 1906 (Stats. 1907, p. 501), to provide that, as to unpatented mines and mining claims, the proceeds alone should be assessed and taxed, and that patented claims shall be assessed at not less than \$500, except when \$100 in labor has been actually performed thereon during the year, in addition to the tax upon the net proceeds, a patented mine cannot be assessed at less than \$500 if no labor

TAXATION—Continued.

has been performed, and a patented mine on which labor has been performed is exempt from taxation except on the proceeds thereof, and, in the absence of any saving clause, an assessment at \$10 per acre under Stats. 1905, c. 58, pursuant to article 10, section 1, prior to the amendment of 1906 was invalid. *Wren v. Dixon*, 170.

See MUNICIPAL CORPORATIONS, 1.

TESTAMENTARY CAPACITY. See WILLS, 2, 3.

TESTATOR'S INTENTION. See WILLS, 1, 2, 3.

TESTIMONY. See DEPOSITIONS, 4; EVIDENCE, 1, 6; TRIAL, 2; WATER AND WATERCOURSES, 3.

THIRD PARTIES. See HOMESTEAD, 1.

TIME FOR FILING COST BILL. See COSTS, 1.

TIME FOR RAISING FEDERAL QUESTION. See COURTS, 1.

TIME OF VESTING. See DESCENT AND DISTRIBUTION, 2.

TIME TO AMEND COMPLAINT. See APPEAL AND ERROR, 8.

TITLE. See QUIETING TITLE, 1, 3; RELIGIOUS SOCIETIES, 1, 2.

TITLE TO REAL PROPERTY. See DESCENT AND DISTRIBUTION, 2.

"TO BE SELECTED." See HOMESTEAD, 2.

TRANSCRIPT ON APPEAL. See APPEAL AND ERROR, 2; COSTS, 2.

TRANSFERRING STOCK. See TROVER AND CONVERSION, 1.

TRESPASS. See ANIMALS, 1, 2.

TRIAL.**1. COMMON-LAW MARRIAGE—INSTRUCTION.**

In an action for restitution of real property, in which the defendant alleged that he was the plaintiff's husband and that the property was community property, an instruction that, as the relationship existing between the parties in another state prior to their taking up their abode in Nevada was illicit and meretricious, that relationship must be by the jury presumed to continue illicit and meretricious throughout all the time plaintiff and defendant continued to live together, unless by a preponderance of proof a valid marriage contract was actually made and actually entered into between the parties within Nevada, was erroneous, as taking all force and effect from evidence in the case tending to establish a marital relation between the parties during their residence in Nevada. *Parker v. De Bernardi*, 361.

2. PROVINCE OF COURT—DETERMINATION OF FACTS FROM CONFLICTING TESTIMONY.

Where the testimony of defendant and his witnesses was controverted by plaintiff's witnesses, it was the exclusive province

of the court below to determine the facts from the conflicting testimony. *Carey v. Clark*, 151.

3. QUESTION OF FACT—NONSUIT.

On a motion for a nonsuit, the evidence should be construed in favor of the plaintiff. *Su Lee v. Peck*, 20.

See DEPOSITIONS, 4.

TROVER AND CONVERSION.

1. TRANSFERRING STOCK—REFUSAL—LIABILITY.

Where a corporation's refusal to issue new stock certificates in smaller denominations for old certificates presented by a shareholder for that purpose is based upon its wrongful assertion of ownership of the stock, the corporation is liable to the shareholder for conversion of the stock. *Robinson M. Co. v. Riepe*, 121.

TRUSTEE. See LIMITATION OF ACTIONS, 1, 3.

ULTIMATE FACTS. See EVIDENCE, 2, 3, 4, 5.

UNDERTAKING ON APPEAL. See INSANE PERSONS, 1.

UNLAWFUL GRAZING. See ANIMALS, 1, 2.

UNLAWFUL OR IMMORAL PURPOSE. See SALES, 1, 2.

USES. See CHARITIES, 5.

VACANCIES. See ELECTIONS, 1.

VALID MARRIAGE. See MARRIAGE, 2; TRIAL, 1.

VALIDITY. See CONTRACTS, 1.

VALIDITY OF CONTRACT. See INTOXICATING LIQUORS, 1.

VALIDITY OF PROCESS. See JUDGMENT, 6, 9.

VALIDITY OF RELEASE FROM LIABILITY. See MASTER AND SERVANT, 1.

VALIDITY OF TAX SALES. See TAXATION, 1.

VALIDITY OF WILLS. See WILLS, 3.

VARIANCE. See PLEADING, 1; QUANTUM MERUIT, 1.

VERIFICATION OF PLEA IN JUSTICE'S COURT. See CRIMINAL LAW, 4.

WATER AND WATERCOURSES.

1. FAILURE TO ESTABLISH ALLEGATIONS OF COMPLAINT.

In an action to determine water rights, where defendant's answer set up at least one allegation, which, uncontroverted and to be taken as true, established priority of appropriation in favor of defendant, plaintiff failing to establish the allegations of his complaint, the court properly dismissed the action on defendant's motion. *Bernard v. Metropolis L. Co.*, 80.

WATER AND WATERCOURSES—*Continued.*

2. FLOWAGE—INDEPENDENT ACTS—LIABILITY.

Where the dam of other parties in conjunction with that of defendants caused the overflow of plaintiff's ranch, defendants were not liable for the whole damage, since, when two or more parties act each for himself introducing the result complained of, they cannot be held liable for the acts of each other. *McLeod v. Miller & Lux*, 447.

3. OVERFLOW—FUTURE INJURY—PROPHECY.

In an action for injury to plaintiff's ranch caused by an overflow from defendants' dam, it was error to allow testimony of a mere prophecy made by a third person to the witness several years before the action that the dam if constructed higher would ruin plaintiff's land. *Idem*.

See EVIDENCE, 2, 3, 4, 5; JUDGMENT, 5.

WIFE'S INTEREST. See HOMESTEAD, 2.

WIFE'S INTEREST IN COMMUNITY PROPERTY. See HUSBAND AND WIFE, 1; TAXATION, 2.

WIFE'S RIGHT TO ACQUIRE DOMICILE. See DOMICILE, 2.

WILLS.

1. CONSTRUCTION—INTENTION OF TESTATOR.

Although the intention of a testator must appear from a perusal of the will, although not necessarily articulated in formal language, the court may take into consideration, in determining such intention, the subject-matter, chief aim of the testator, and all the surrounding circumstances. *In Re Hartung*, 262.

2. CONTEST—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

Evidence in a will contest, *held* to sustain a finding that, when the testator's aided signature was made, he did not know that the instrument he was signing contained provisions as to the distribution of his estate which he had formerly discussed with the draftsman, or ordered him to prepare. *In Re Gordon*, 300.

3. SIGNATURE—STATUTE.

Under Stats. 1915, c. 35, providing that no will shall be valid unless it be in writing and signed by the testator or by some person in his presence and by his express direction, a signature to a will by having another aid or steady the hand of the testator, at his request, is valid, if the testator possessed testamentary capacity, was acting under no undue influence, and realized the force and effect of the provisions of the will he was signing. *Idem*.

See CHARITIES, 1, 2, 3, 4, 5; DESCENT AND DISTRIBUTION, 2.

WISDOM OR POLICY OF LEGISLATION. See CONSTITUTIONAL LAW, 5.

WITNESSES. See EVIDENCE, 2, 3, 5, 6.

WORK AND LABOR. See QUANTUM MERUIT, 1.

WORKMEN'S COMPENSATION. See MANDAMUS, 4, 5; MASTER AND SERVANT, 1.

"WORTHY OF ITS NAME." See CHARITIES, 1, 3.

WRIT OF ERROR. See MANDAMUS, 3.

WRIT OF ERROR TO U. S. SUPREME COURT. See COURTS, 1, 4.

WRIT OF MANDAMUS. See MANDAMUS, 1, 2, 3, 4, 5.

WRIT OF PROHIBITION. See PROHIBITION, 1.

WRONGFUL GARNISHMENT. See GARNISHMENT, 1, 2, 3.

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